

# Supreme Court of the United States

OCTOBER TERM, 1920.

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No.

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HENRY S. DE REES,

*Plaintiff-Appellant,*

*against*

DAVID COSTAGUTA, MARCOS A. ALGIERS, ALEJANDRO SASSOLI, EUGENIO OTTOLENGHI, individually and as co-partners in business composing the co-partnership of David Costaguta & Company, RENADO TAFFELL and the AMERICAN-EUROPEAN TRADING CORPORATION,

*Defendants-Appellees.*

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APPEAL FROM DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

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**Bill of Complaint.**

IN THE

**District Court of the United States**

FOR THE SOUTHERN DISTRICT OF NEW YORK.

HENRY S. DE REES,  
Plaintiff,  
against

DAVID COSTAGUTA, MARCOS A.  
ALGIERS, ALEJANDRO SASSOLI,  
EUGENIO OTTOLENGHI, individ-  
ually and as copartners in  
business composing the copart-  
nership of David Costaguta &  
Company, Renado Taffell and  
the American-European Trad-  
ing Corporation,  
Defendants.

*To the Honorable the District Court of the United States for the Southern District of New York:* 3

AND now comes the plaintiff, Henry S. De Rees, by Messrs. Erwin, Fried and Czaki, his solicitors, and respectfully shows and avers to this Honorable Court as follows:

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FIRST: That at all of the times hereinafter mentioned the plaintiff was and now is a citizen and resident of the State of New Jersey, and that he has an office and place for the transaction of his business in the City of New York, Southern District of New York.

SECOND: That the defendants David Costaguta and Alejandro Sassoli, at all of the times hereinafter mentioned, were, and now are, citizens and subjects of the Kingdom of Italy and residents of the Republic of Argentine.

- 5 THIRD: That the defendant Eugenio Ottolenghi, at all of the times hereinafter mentioned, was and now is a citizen of the Republic of Argentine and a resident of the City of Buenos Aires, Argentine Republic.

FOURTH: That the defendant Marcos Algiers, at all of the times hereinafter mentioned, was and now is a citizen of the Republic of France, and now is a resident of the City of Buenos Aires, in the Republic of Argentine.

- 6 FIFTH: That the defendant Renado Taffell, at all of the times hereinafter mentioned, was and now is a citizen of the Kingdom of Great Britain and Ireland, and now is a resident of the City of New York, in the Southern District of New York.

SIXTH: That at all of the times as hereinafter more particularly mentioned the defendants David Costaguta, Marcos Algiers, Alejandro Sassoli and

Eugenio Ottolenghi were, and now are, copartners in business under the firm name and style of David Costaguta & Company, with offices and place for the transaction of their business at No. 1382 Calle Alsina, in the City of Buenos Aires, Republic of Argentine, and at No. 22 White Street, in the City of New York, in the Southern District of New York.

SEVENTH: That at the times as hereinafter mentioned the defendant, the American-European Trading Corporation, was and now is a corporation organized under and existing by virtue of the laws and a citizen of the State of New York, and having its office and place for the transaction of its business at No. 1270 Broadway, in the City of New York, in the Southern District of New York; and that, as the plaintiff is informed and verily believes, that one Leon Grumet is the President thereof and the defendant Renado Taffell is the Secretary and Treasurer thereof; and that said Leon Grumet is the agent and duly constituted representative in the City of New York, in the Southern District of New York, under and by virtue of a duly authorized Power of Attorney, of the defendant, the copartnership firm of David Costaguta & Company. 8

EIGHTH: And the plaintiff doth further complain and aver: That in or about the month of April, 1915, the defendants David Costaguta and Marcos Algiers then were copartners in business under the firm name and style of David Costaguta & Company, with an office and place for the 9

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transaction of their business in the City of Buenos Aires, Republic of Argentine, and at that time said David Costaguta and Marcos Algiers duly made and entered into a contract in writing with the plaintiff wherein and whereby in substance and effect a copartnership was created between the plaintiff and said partnership of David Costaguta & Company, for the particular and exclusive purpose, and no other, of buying and selling hosiery, manufactured in the United States and Europe, in the name of David Costaguta & Company, the said David Costaguta & Company to advance the capital required therefor and the plaintiff to buy, sell, manage and direct the said copartnership business, it being further agreed that the profits thereof should be divided one-half to the plaintiff and one-half to said David Costaguta and Marcos Algiers, and that the losses, if any, should be equally borne and sustained.

NINTH: That from about the said month of April, 1915, to and including the 31st day of October, 1917, the business of said copartnership between the plaintiff and the said David Costaguta & Company, as thus constituted, continued with success in the operations thereof, with the result that on said 31st day of October, 1917, the said David Costaguta and Marcos Algiers represented and acknowledged to the plaintiff that he had to his credit, on the books of said copartnership, a cash balance of 31,253.99 Argentine pesos, and that the merchandise, the property of said copartnership, then on hand and remaining unsold, and in which your orator had a one-half interest, was of the value of 302,332.18 Argentine pesos.

TENTH: That on or about the said 31st day of October, 1917, the partnership composed of David Costaguta and Marcos Algiers was reconstituted by the admission, as partners therein, of the defendants Alejandro Sassoli and Eugenio Ottolenghi, and the defendants David Costaguta, Marcos Algiers, Alejandro Sassoli and Eugenio Ottolenghi, as partners composing the firm of David Costaguta & Company, thereupon duly assumed all of the liabilities and took over all of the assets of the partnership as theretofore composed of the said David Costaguta and Marcos Algiers, and the copartnership between the plaintiff and the said David Costaguta and Marcos Algiers was then and there terminated and came to an end.

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ELEVENTH: That thereafter and on the 1st day of November, 1917, at the City of Buenos Aires, in the Republic of Argentine, the plaintiff entered into a contract in writing with the defendants David Costaguta, Marcos Algiers, Alejandro Sassoli and Eugenio Ottolenghi as partners then constituting the firm of David Costaguta & Company, wherein and whereby it was agreed between said David Costaguta & Company on the one hand and the plaintiff on the other that a copartnership should be and thereby was created and established between them in substance and effect upon the following terms and conditions:

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(a) That a special section, business and enterprise shall be established, to be conducted on the premises and in the name of David Costaguta & Company, in the City of Buenos Aires, Argentine

Republic, and elsewhere, as may be agreed upon, for the purchase and sale of hosiery and any other articles of knit goods or any other kind of merchandise which it may, by mutual accord, be agreed to buy, sell or deal in, said special section to be known and called the "Hosiery Section."

- (b) That the plaintiff was to have the exclusive charge of and the right to make all the purchases of the merchandise dealt in, except, that the said David Costaguta & Company reserved the right to require the plaintiff to submit for approval all purchases that he made while in Buenos Aires, but  
17 that as to all purchases the plaintiff made while in North America or Europe he was to have complete liberty of action within the limits which said David Costaguta & Company may fix in writing.

(c) That the plaintiff shall have exclusive charge of the sale of said merchandise purchased in the business of said copartnership, said David Costaguta & Company reserving the right only to pass upon the credits and terms of sale.

- (d) That only such expenses shall be charged to the business of said copartnership as directly belonged to it, that is to say, the salary of its own employees directly and exclusively concerned in the conduct of its business, travelling expenses, commission paid to brokers, telegrams, postage and  
18 such other incidental expense directly connected with the business of said copartnership, whereas, it was agreed that the expense of rent, light, heat, licenses, taxes, salaries of bookkeepers, clerks or accountants engaged in and about the keeping of



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the books, records and accounts of said copartnership, porters and laborers who handle, pack, unpack, load and unload, carry or otherwise handle the merchandise of the copartnership, shall be charged exclusively to the individual account of said David Costaguta & Company.

(e) That on the 31st day of October in each year, the accounts and transactions of said copartnership shall be balanced, and the profits or losses, as the case may be, shall then be ascertained and determined and in so doing such depreciation in the market value of the merchandise shall be made as may be mutually agreed upon and as shall be found to be convenient or necessary to be made and such bad or doubtful debts shall be charged off as may, by mutual accord, be agreed upon. 20

(f) That from the net profits so mutually ascertained there shall be deducted and paid to said David Costaguta & Company, a sum equal to 6% per annum interest on the amount of the net capital supplied by David Costaguta & Company to and actually used by, the copartnership in the business of the said Hosiery Section, said interest calculations and ascertainment of and capital employed to be made semi-annually by a semi-annual account current evidencing all advances and disbursements made by David Costaguta & Company to or for the benefit of the copartnership and all moneys received by the said David Costaguta & Company belonging to said copartnership together with interest at 6% per annum debited on said advances and credited on said receipts, and in case the profits at the end of any one year are insufficient to repay to said 21

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David Costaguta & Company the net amount of said capital advanced and so ascertained, that then said balance shall be carried over into the succeeding balance.

(g) That all net profits so mutually ascertained and determined as hereinbefore averred in subdivision (f) of this Bill of Complaint, shall be divided 55% thereof to said David Costaguta & Company and 45% thereof to the plaintiff and all losses incurred shall be divided, sustained and borne in the same proportion.

(h) That the plaintiff shall be entitled to draw and be paid monthly, from the funds of said copartnership, a sum equal to 1500 Argentine pesos, which shall be charged to his personal account and he shall, in addition thereto, be entitled to draw and be paid from time to time 50% of his share of all such net profits as and when ascertained and determined, leaving 50% of his net profits on deposit with said David Costaguta & Company, on which it was to pay the plaintiff 6% interest per annum; and which deposit they were to hold as security, so far as provided for under the terms of the contract, and to be utilized by it as capital advanced to the copartnership and to be accounted for and paid over to the plaintiff at and on the termination of said contract relation.

(i) That the plaintiff shall devote his undivided time and attention to the business of said copartnership and he will not directly or indirectly, participate in any other commercial business nor shall he be interested in any other commercial business

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foreign to the business of the said copartnership; and in the event of a breach upon the part of the plaintiff of this provision of said contract, the said David Costaguta & Company reserved the right to declare forfeited the profits earned by the plaintiff in the fiscal year in which said breach of this covenant occurred.

(j) That both parties reserved the right, upon three months' written notice by registered mail, to terminate said copartnership and revoke said contract, and in the absence of the plaintiff from Buenos Aires said David Costaguta & Company, should they desire to terminate said contract, will do so by cable, addressed to the plaintiff at the last address indicated by him.

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(k) That in the event the plaintiff or said David Costaguta & Company elected to and did terminate said copartnership and revoke said contract, either of said parties had the right to demand that the affairs of said copartnership shall be jointly liquidated by the sale of the merchandise on hand, in the Custom House, in transit, or in course of manufacture and pertaining to the business of said copartnership, and the plaintiff agreed to continue his co-operation, so far as necessary, in and about said liquidation up to the time when all of the said merchandise shall have been entirely sold, at which time adjustments were to be made as to the value of merchandise taken over, if any, or bad debts, as might be fixed by mutual accord, as in case of the ascertainment of profits under the provisions of annual settlements as hereinbefore set out in subdivision (e) of this paragraph of the Bill of Com-

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plaint, and thereupon said David Costaguta & Company were to take over and become the sole owner of all of the assets of the copartnership, paying to the plaintiff the sum realized as the result of said liquidation, to which the plaintiff is entitled in said copartnership property so liquidated, in four equal installments; the first installment immediately in cash and the remaining three installments in six, twelve and eighteen months thereafter together with interest thereon at 6% per annum.

- 29 (1) That in the event either party shall terminate said copartnership and revoke said contract by notice and in the further event a liquidation of said merchandise and property of said copartnership is not demanded by either party as provided by the article of said contract numbered 11, as averred in sub-division (k) of paragraph "Eleventh" of this Bill of Complaint, and said David Costaguta & Company desires to become the sole owner of the business of said copartnership and its assets without liquidation, then and in those events, a balance shall be mutually arrived at and determined as provided in Article "5" of said contract and as averred in sub-division (e) of paragraph "Eleventh" of this Bill of Complaint, relative to adjustment of merchandise values and credits, and the said David Costaguta & Company
- 30 shall thereupon take over all of the assets and assume all of the liabilities and pay to the plaintiff the amount so found to be due to him in four equal installments, the first immediately in cash and the remaining three installments in six, twelve and eighteen months thereafter, together with interest thereupon at 6% per annum.

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(m) That in the event of the death of the plaintiff the said David Costaguta & Company being the surviving partner, shall thereupon liquidate the entire stock of merchandise of the copartnership within one year from the day of such death and close and balance the accounts thereof and pay to the heirs of the plaintiff the amount so found to be due to him in four equal installments, the first immediately in cash and the remaining three in six, twelve and eighteen months thereafter, together with interest at 6% per annum.

(n) That in order to avoid possible confusion it was agreed that the business of said copartnership was to have no relation to the production of hosiery of the factory of David Costaguta & Company known as "La Tejedora." 32

TWELFTH: And the plaintiff further avers that on said 1st day of November, 1917, the copartnership, composed of the plaintiff and the partnership of David Costaguta & Company as composed of the defendants David Costaguta, Marcos Algiers, Alejandro Sassoli and Eugenio Ottolenghi, took over all of the assets and assumed all of the liabilities of the copartnership theretofore existing and composed of the plaintiff and the said David Costaguta & Company, consisting of David Costaguta & Marcos Algiers. That of the assets thus taken over the merchandise on hand and in stock alone was of the value of 302,332.18 Argentine pesos, in which the plaintiff had a community interest to the extent of 45% thereof exclusive of a cash balance to the credit of his capital account of 31,253.99 Argen- 33

tine pesos, making a total contribution of capital to his credit in said copartnership of not less than 167,293.47 Argentine pesos.

THIRTEENTH: That on or about the 20th day of November, 1917, the plaintiff, in pursuance of the business of the copartnership, and for the purpose of purchasing and selling its merchandise, left the City of Buenos Aires, and since his arrival in the City of New York, on the 28th day of December, 1917, he has continuously resided in the United States, engaged in the business of said copartnership until subsequent to the termination of said contract of partnership. That all of the books, records, documents and accounts of the business of said copartnership have been kept by said David Costaguta & Company in the City of Buenos Aires, by its bookkeepers and accountants, except as hereinafter averred, and the plaintiff has no knowledge or information as to the entries in said books kept in the City of Buenos Aires, or of the fiscal accounts and transactions of the business of said copartnership except as the said David Costaguta & Company have advised the plaintiff by correspondence and statements rendered, to which reference will hereafter be more particularly made, and the plaintiff never has had any detailed accounts or record of any of the transactions of the copartnership, either

as to purchases, sales or otherwise, as the same may be entered upon the copartnership books in Buenos Aires, although he has frequently demanded the same and that said David Costaguta & Company have frequently refused, failed and neglected to furnish the plaintiff with such detailed informa-

tion which he as a partner was entitled to demand and receive.

FOURTEENTH: That from said 1st day of November, 1917, to and including the 31st day of October, 1918, the plaintiff, on behalf of said copartnership, purchased in the United States, merchandise of the value in excess of 2,000,000 Argentine pesos, which, with the merchandise on hand on November 1st, 1917, of the value of 302,332.18 Argentine pesos, was, in part, sold by the plaintiff during the year between November 1st, 1917, and October 31st, 1918, and there remained unsold on said 31st day of October, 1918, in the City of Buenos Aires, as stated and represented by said David Costaguta & Company to the plaintiff, merchandise of the value of 1,321,993.26 Argentine pesos. That the said David Costaguta & Company in a statement of account rendered to the plaintiff as of October 31st, 1918, further stated and represented to the plaintiff, that the net profits earned in the business of said copartnership during said year beginning November 1st, 1917, and ending October 31st, 1918, aggregated 243,270.17 Argentine pesos, but that said profits were not ascertained by mutual accord or determined as provided by said contract of copartnership, and did not justly, correctly or accurately represent the profits actually earned in said year. That the plaintiff objected to the statement of said profits so rendered to him by said David Costaguta & Company and protested against the balance as shown by said statement and the items as therein contained, but that the said David Costaguta &

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Company failed, refused and neglected to correct, alter or amend the same.

FIFTEENTH: That the statement rendered by the said David Costaguta & Company to the plaintiff as of the 31st day of October, 1918, purported to credit to the plaintiff's capital account the sum of 54,735.79 Argentine pesos as representing one-half of the amount claimed to be the share of the plaintiff in said profits ascertained of that date, which, together with the sum of 15,552.47 Argentine pesos claimed by said David Costaguta & Company to be the balance remaining to the plaintiff's credit in his capital account, after withdrawals during said year, represented a total cash capital on November 1st, 1918, of 70,288.26 Argentine pesos, exclusive of the plaintiff's community interest of 45% in the merchandise claimed to be on hand and unsold on that date, aggregating 1,321,993.26 Argentine pesos.

SIXTEENTH: That shortly after the 28th day of December, 1917, the date of the arrival of the plaintiff in the City of New York, he opened and established an office and place for the transaction of the business of said copartnership at No. 395 Broadway, and subsequently transferred the same to No. 22 White Street, in the City of New York, in the Southern District of New York, and from time to time the plaintiff purchased and placed in said premises and in warehouses in said City and District, merchandise belonging to said copartnership, so that, on the 31st day of October, 1918, said copartnership held, in said City of New York, merchandise of the value of about 750,000 besides out-



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standing contracts for the delivery to it of additional merchandise, due from time to time during the year 1919, aggregating approximately \$1,000,000, of all of which, from time to time and prior to the 31st day of October, 1919, there was shipped to the copartnership for sale in Buenos Aires, merchandise of the value of about \$500,000, which has in large part been sold in Argentine, Chili, Bolivia, Uruguay and elsewhere, at large net profits to said copartnership. That from October 31st, 1918, to the date of the filing of this Bill of Complaint, the plaintiff sold merchandise for and on behalf of said copartnership in the United States of America, aggregating many hundreds of thousands of dollars in value and realized upon the sale thereof net profits of about \$125,000, all of which said merchandise was sold in the name of David Costaguta & Company and the proceeds thereof was received for the account of said copartnership by said David Costaguta & Company, except as hereinafter more particularly averred.

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SEVENTEENTH: That at various times between the date of the arrival of the plaintiff in the United States of America and the 31st day of October, 1919, numerous, serious and irreconcilable differences arose between the plaintiff and the said David Costaguta & Company, regarding the conduct and management of the business of said copartnership. The said David Costaguta & Company refused to pay for merchandise which the plaintiff purchased and contracted for in the name and for the benefit of said copartnership; it sent to the United States of America different representatives with powers of

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attorney and instructions to supersede and it did largely supersede the plaintiff in the conduct and management of the business of said copartnership, depriving the plaintiff of the right to sell said merchandise of said copartnership to its best interest, said representatives, over the objections and protests of the plaintiff, selling said merchandise at prices largely below the market value thereof; that it failed to keep in the City of New York accurate books of account of the transactions in and about the purchase and sale of said merchandise; that it unnecessarily became involved in litigations growing out of the business of the copartnership and otherwise, causing it loss and damage; that it refused to permit the plaintiff to direct the sale of said merchandise in this country to the end that the best prices could not be obtained therefor, that it failed, refused and neglected, although frequently demanded so to do, to give to the plaintiff an accounting in detail of the transactions of the copartnership for the business of the year 1918, and never has, at any time, given the plaintiff the semi-annual account current provided for by said contract and as averred in paragraph "Eleventh," subdivision (f) of this Bill of Complaint, although duly demanded so to do.

48 EIGHTEENTH: That by reason of said differences and dissensions and the inability of the plaintiff to work in harmony and good will with the said David Costaguta & Company and its representatives, who from time to time attempted and did interfere with and superseded the plaintiff in the conduct of the affairs of said copartnership, and by reason of its

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breaches of said contract, the plaintiff did, on the 22nd day of August, 1919, give ninety days' formal written notice by mail to the said David Costaguta & Company, addressed to it at Buenos Aires, Argentine Republic, that the plaintiff elected to and did terminate said copartnership, said termination to take effect on and as of the 22nd day of November, 1919. That thereafter, and on September 19th, 1919, the said David Costaguta & Company acknowledged the receipt of said notice of cancellation and accepted the termination of said contract to take effect on and as of the 22nd day of November, 1919. That thereafter and on the 10th day of November, 1919, the plaintiff, as provided by said contract of copartnership, elected to and did demand a compelte liquidation in pursuance of Article "ii" of said contract and as averred in subdivision (k) of paragraph "Eleventh" of this Bill of Complaint, and gave to said David Costaguta & Company formal written notice to that effect, to which, on November 14th, 1919, the said David Costaguta & Company formally agreed in writing.

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NINETEENTH: That at various times between the 31st day of October, 1919, and the date of the filing of this Bill of Complaint, the plaintiff duly demanded of the said David Costaguta & Company an accounting and detailed statement of the transactions of the business of the copartnership for the year beginning November 1st, 1918, and ending October 31st, 1919, and as of said last mentioned date, as provided by said contract, and evidencing the profits made and earned in said business during said period, but that said David Costaguta & Com-

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pany has failed, refused and neglected so to do, although frequently recognizing its obligation so to do, giving pretenses, evasion and subterfuges for its failure to comply with the plaintiff's demand; that the plaintiff has demanded the payment to him of the money due to him and carried as capital to his credit from the profits earned in the year 1917 to 1918, and 1918 to 1919, but said David Costaguta & Company has refused so to do, although there is admittedly a large amount due to the plaintiff and to his credit on the books of the copartnership.

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TWENTIETH: That on or about the 22nd day of November, 1919, there remained and was on hand and unsold in the City of New York, in the Southern District of New York, merchandise belonging to said copartnership of the value of about \$100,000, which said merchandise was in the premises No. 22 White Street and various warehouses in said City and District, in the name and in the possession of said David Costaguta & Company, holding the same for said copartnership, which the plaintiff attempted to sell and liquidate for the best interests of said copartnership, but that the said David Costaguta & Company refused to permit the plaintiff to sell said merchandise to the best advantage, and endeavored to and did sell large quantities thereof at little or no profit, insisting that the merchandise be speedily disposed of regardless of the prices received therefor, and did sacrifice the same at prices much below their market value. That during the period between November 22nd, 1919, and the 1st day of February, 1920, the said copartnership had

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large funds to its credit in bank in the name of said David Costaguta & Company, and had large outstanding accounts due to it for the sale of merchandise theretofore and in that period made, said funds being deposited in the following named banks: The National City Bank, the Foreign & American Banking Corporation, the Citizens Central National Bank, The Italian Discount & Trust Company, The Guaranty Trust Company and the Central Trust Company of New Jersey. That the funds belonging to said copartnership so held by said David Costaguta & Company were commingled with funds of David Costaguta & Company arising from and out of the transactions other than those of said copartnership. That said David Costaguta & Company had title, possession, custody and control in the City of New York, Southern District of New York, of large assets consisting of merchandise other than the merchandise belonging to the copartnership and had other value assets in said City and District, the exact nature and description of which the plaintiff is at present unable to more particularly specify, but which were purchased and acquired by said David Costaguta & Company with the commingled funds belonging to the copartnership and said David Costaguta & Company. That during the period between the 1st day of May, 1919, or thereabouts, and the 15th day of February, 1920, or thereabouts, the defendant Eugenio Ottolenghi, a member of the firm of David Costaguta & Company, was present in the City of New York in said District, and was in active charge, management and control of all of its affairs.

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TWENTY-FIRST: That in or about the month of January, 1920, the said David Costaguta & Company, for the purpose of defrauding the plaintiff and intending thereby to thwart him in the assertion of his just rights and remedies, and to prevent him from receiving and collecting from the property of said copartnership the moneys justly due to him, conceived the scheme and design of organizing a corporation under the laws of the State of New York, to which it would transfer and convey all of the property, assets and effects of said copartnership and all of the property, assets and effects of the said David Costaguta & Company, held in the City of New York, aforesaid. That the plaintiff, between January 6th and 29th, 1920, had reported to said David Costaguta & Company at New York, sales of sixty-five cases of hosiery to one Weil, Feinberg & Co., Inc., a customer with whom he was in negotiation for the sale thereof. That said sales were never in fact consummated, and for which merchandise he had instructed the New York office of David Costaguta & Company, in whose actual custody the same was held for the account of said copartnership, to make out invoices to said Weil, Feinberg & Co., Inc., and deliver the same to the plaintiff, and said invoices were so made out and delivered to him, but that said invoices were never rendered by the plaintiff to said Weil, Feinberg & Co., Inc., with whom negotiations for said sales failed. That the plaintiff being cognizant of the fraudulent scheme and conspiracy aforesaid, on the part of said David Costaguta & Company, to place the copartnership assets beyond his copartnership control and to prevent the same, so far as he was

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able, took over, for the account of said copartnership, and stored in his own name, the said merchandise so invoiced to said Weil, Feinberg & Co., Inc. That the plaintiff has sold in regular course of trade 32 cases of said merchandise for the sum of \$20,840.65, which includes a profit thereon of \$5,000, and he still holds thirty-three cases thereof unsold, all of which the plaintiff holds for the benefit of said copartnership and subject to the accounting herein. That hereto annexed, marked Exhibit "A," is a complete and detailed schedule of said sixty-five cases of merchandise evidencing those still unsold and those sold, the names and addresses of the persons to whom sold and the amounts realized therefor, to which reference is made with the same force and effect as though herein set out *in extenso*.

62

TWENTY-SECOND: That, in pursuance to the fraudulent scheme and conspiracy as aforesaid, the said David Costaguta & Company on or about the 31st day of January, 1920, caused to be incorporated and organized, the defendant, the American-European Trading Corporation, under the laws of the State of New York, with dummy incorporators and dummy directors, the incorporators named in the Certificate of Incorporation being Robert Lowenstein, Sr., Arthur Delafield Smith, Vinnie I. Jones, Nathan Levy and Alexander Gritzner, each of whom, for the purpose only of qualifying them as incorporators, agreed in said Certificate of Incorporation to subscribe for and take one share of its capital stock. That said defendant, the American-European Trading Corporation, was organized with an authorized capital stock of \$10,000, divided

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into shares of the par value of \$100 each, and the amount of capital with which it was to begin business was \$500; that the Articles of Incorporation thereof provided that its directors need not be stockholders; that the number of its directors were three and the directors mentioned in its Articles of Incorporation for the first year were said Robert Lowenstein, Sr., Arthur Delafield Smith and Vinnie I. Jones. That the plaintiff is informed and verily believes, all of the capital stock of said defendant, the American-European Trading Corporation, is now owned and held by the said David Costaguta & Company, to whom it was issued in alleged consideration of the transfers to it by said David Costaguta & Company as hereinafter averred.

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TWENTY-THIRD: That immediately after the organization of said defendant, the American-European Trading Corporation, the said David Costaguta & Company, in furtherance of said fraudulent scheme and conspiracy, and on or about the 1st day of February, 1920, and thereafter and without the consent of your orator, transferred, conveyed and set over to the defendant, the American-European Trading Corporation, all of the merchandise, property, money, accounts, choses in action and other assets of the copartnership, as well as all of the merchandise, property, money, accounts, choses in action and other assets belonging to the said David Costaguta & Company. That said transfers were so made in bulk, not in the usual course of trade in liquidation of the copartnership assets, without any actual consideration paid



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therefor otherwise than the issuance, by said defendant corporation, of all of its capital stock to said David Costaguta & Company. That said David Costaguta & Company closed and discontinued all of its bank accounts and the large sums of money so withdrawn, were deposited in part to the credit of the said defendant corporation and part in the name of the defendant Renado Taffell, who since said transfer, has been disbursing the same in his individual name for the benefit and account of said defendant corporation and the said David Costaguta & Company.

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TWENTY-FOURTH: That there is now in the possession, custody and control of said defendant corporation, in the Southern District of New York, twenty-two cases of merchandise consisting of hosiery of the value of about \$15,000, the property of the copartnership, all of the accounts outstanding due to the copartnership on the sale of hosiery aggregating many thousand dollars; nine thousand and ninety-one hides of the value of about \$150,000 acquired by said David Costaguta & Company, with the commingled funds of the copartnership, besides other property, the character and description of which the plaintiff is at the present time unable to particularly specify. That, in addition to the property so fraudulently transferred to the defendant, the American-European Trading Corporation, there was also transferred to it by said David Costaguta & Company the following contracts, claims and choses in action, the property of said copartnership: A certain contract for the sale and delivery of 20,000 dozen of hosiery of which 19,500 dozen

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- remain undelivered of the contract price of \$20,900 made with the Loudon Hosiery Mills, of Loudon, Tennessee; a contract for the sale and delivery of 20,000 dozen of hosiery, of which 11,000 dozen remain undelivered, of the contract price of \$14,850, and a contract for the sale and delivery of 10,000 dozen of hosiery, of which 900 dozen remain undelivered of the contract price of \$1,665 made with the Sweetwater Hosiery Mills of Sweetwater, Tennessee; a contract for the sale and delivery of 20,000 dozen hose, of which 12,000 dozen of the contract of \$26,400 remain undelivered, made with the Aycock Hosiery Mills of South Pittsburgh, Tennessee.
- 71 A contract for the sale and delivery of 15,000 dozen hose, of which 10,500 dozen remain undelivered, of the contract price of \$19,925, made with F. Y. Kitzmiller of Reading, Pennsylvania. A claim for the breach of a contract for the purchase and sale of hose, made with the Ellis Hosiery Company of Philadelphia, Pennsylvania, said claim aggregating about the sum of \$1,500; a claim against the Allen Hosiery Company of Philadelphia, Pennsylvania, for the breach of a contract for the non-delivery of about 7,000 dozen of hose, said claim aggregating the sum of about \$18,000. A claim for damages for the non-delivery of 30,000 dozen hose, against A. H. Rumberger of Philadelphia, Pennsylvania, aggregating the sum of \$15,000.
- 72 A claim for damages for breach of warranty growing out of the purchase and sale of 2,000 dozen hose, aggregating \$2,250, against Thompson Brothers of Milroy, Pennsylvania; a contract for the sale and delivery of 22,000 dozen hose, of which 20,000 dozen remain undelivered, of the contract price of \$37,000, made with

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the Rockwood Hosiery Mills of Rockwood, Tennessee. A claim for the breach of a contract for the sale and delivery of 20,000 dozen hose, for failure to deliver the same, aggregating \$8,500, against the Harriman Hosiery Mills, Harriman, Tennessee. A claim against the Colonial Knitting Mills, Inc., of Philadelphia, Pennsylvania, aggregating \$8,500, for failure to deliver 8,500 dozen hose. That all of said contracts for the purchase and sale of hose, as aforesaid, were made in the name of the said David Costaguta & Company and for the benefit of said copartnership and, as to a number of said contracts and claims, suits have been instituted and are pending to recover damages sustained by said partnership for the breaches of said contracts.

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And the plaintiff charges that all of the property, assets, money and effects now held by the defendants and each of them, and particularly the capital stock of the defendant, the American-European Trading Corporation, held by and in the name of the defendants, composing the partnership of David Costaguta & Company, the situs of which is in the City of New York, in the Southern District of New York, is charged with a trust and subject to the claim and lien of the plaintiff, and the plaintiff further charges that the defendants and each of them took said property charged with a trust in favor of the plaintiff and hold the same with knowledge and notice of the copartnership, lien and claim of the plaintiff and with knowledge and notice of the fact that said property was transferred with the preconceived intent and design upon the part of the said David Costaguta & Company to hinder, delay and defraud the plaintiff and to impede him

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in the enforcement of his legal and equitable rights and remedies.

WHEREFORE, the plaintiff respectfully prays this Honorable Court that a decree be made and entered herein, in due course, which shall provide:

77 1st. That the copartnership created under and by virtue of the contract between the plaintiff and the said David Costaguta & Company, as hereinbefore averred, and dated the 1st day of November, 1917, be declared dissolved, and that all of the property, assets and effects thereof wheresoever situate, lying and being, be liquidated, sold and disposed of and converted into cash with all due and convenient speed and to the best interests of said copartnership.

78 2nd. That the said David Costaguta, Marcos Algiers, Alejandro Sassoli and Eugenio Ottolenghi, composing the firm of David Costaguta & Company, account to the plaintiff for all of their acts, conduct and transactions in and about the business of said copartnership, to the end that it be established, what, if any, sum or sums there be and remain due and unpaid to the plaintiff from said David Costaguta & Company, in and about the business and transactions of said copartnership, and in the adjustment of their respective claims in said copartnership business.

3rd. That the plaintiff be decreed to have a lien upon all of the property, assets and effects of the defendants David Costaguta, Marcos Algiers, Alejandro Sassoli and Eugenio Ottolenghi, individ-

*Bill of Complaint.*

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ually and as partners composing the firm of David Costaguta & Company, and on all of the property, assets and effects of the American-European Trading Corporation into which the copartnership assets have been converted, or with which the said assets have been commingled, and that all of the property, assets and effects, aforesaid, of the said defendants and each of them, and particularly all of the capital stock of the said American-European Trading Corporation standing upon its books, in the name of the said David Costaguta & Company, or in the name of any of its individual members, or in the name of any other person, firm or corporation, be declared charged with a trust in favor of the plaintiff.

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4th. That a Receiver *pendente lite* be appointed herein of all of the property, assets and effects, of whatever kind, character, nature or description and wheresoever situated, of the copartnership composed of the plaintiff and the partnership of David Costaguta & Company, and of all of the property, assets and effects of the partnership of David Costaguta & Company, composed of the said David Costaguta, Marcos Algiers, Alejandro Sassoli and Eugenio Ottolenghi, which are or have been commingled with the assets of said copartnership and of all of the property, assets and effects of the defendant, the American-European Trading Corporation, and of the capital stock thereof, and regardless as to whether the said capital stock or any of the property of any of the defendants or of said copartnership is held in the name of said defendants or in the name of any other person, firm or

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*Bill of Complaint.*

corporation for them; that said Receiver take, hold and administer the property of and liquidate the affairs of the said copartnership; that said Receiver take and hold, subject to the further order and judgment of this Court, the property, assets and effects of the said David Costaguta & Company and the American-European Trading Corporation, into which the property, assets and effects of the said copartnership shall be traced, and take and hold, subject to the like order and judgment of this Court, such property and effects held by each and all of the defendants to answer to any judgment that may be rendered against them in this suit.

83

5th. That the plaintiff and each and all of the defendants herein, their agents, servants and employees, and each and every other person, firm or corporation having possession, custody or control of any of the property of the said copartnership, or of the property of any of the defendants, be directed to deliver the same to said Receiver, and that all of the defendant copartners and each other person, firm or corporation defendant, holding any such property, be restrained and enjoined during the pendency of this suit, or until the further order and judgment of this Court, from in any manner or in any form whatsoever, transferring, assigning or disposing of any of the property of said copartnership, otherwise than to deliver the same to said Receiver.

84

6th. That a temporary restraining order be issued herein, which shall provide that said David Costaguta, Marcos Algiers, Alejandro Sassoli and

*Bill of Complaint.*

85

Eugenio Ottolenghi, individually and as copartners composing the firm of David Costaguta & Company, Leon Grumet as the agent and attorney in fact of the said David Costaguta & Company, the defendant Renado Taffell, the servants, agents or attorneys of said David Costaguta & Company, or of the individual members thereof, the American-European Trading Corporation, its officers, agents, servants and employees, or any other person, firm or corporation having possession, custody and control of any of the property of the copartnership composed of the plaintiff and said David Costaguta & Company, or having possession, custody and control of the property of the said defendant, American-European Trading Corporation, be and they hereby are jointly and severally enjoined and restrained, pending the hearing and determination upon the return of a rule *nisi*, from in any manner or form whatsoever, interfering with, assigning, transferring or disposing of or of removing from the jurisdiction of this Court any property of any kind, character, nature or description whatsoever and wheresoever situate belonging to the defendants or either of them, or belonging to the said copartnership.

86

7th. And the plaintiff does further pray the Court's most gracious writ of subpoena directed to the defendants and to each of them, requiring them and each of them to answer unto this Bill, on a day therein to be named, and may it please your Honors to grant unto this plaintiff such other and further relief in the premises, as the nature of his case may require and to the Court may seem meet

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*Bill of Complaint.*

and appropriate and in accordance with equity and good conscience, and the plaintiff further prays that in respect of such of the defendants as are not found in the District, the Court will make an order setting forth that the plaintiff is claiming an interest in and lien upon property, the situs of which is now in this District and require such defendants as may not thus be found in this District, to demur, plead or answer to this Bill at a day therein to be named, in accordance with the statute in such case made and provided.

AND the plaintiff will ever pray,

FREDERICK M. CZAKI,  
ERWIN, FRIED & CZAKI,  
Solicitors for the plaintiff,  
Office and Post Office Address,  
15 William Street,  
New York City.



HENRY S. DE REES.

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no bill		660.00	2684	on hand				
			5094	PC Vafopulo				130.13
Jan. 14	19		5005	on hand	"	4	115	475.55
		690.00	5025	"				
		690.00	1191	"				
		690.00	1193	"				
		690.00	1207	"				
		690.00	1192	"				
		690.00	1283	"				
		690.00	1190	"				
		690.00	1282	"				
		690.00	11	"				
		690.00	12	"				
		690.00	43	"				
		690.00	33	"				
		690.00	34	"				
		690.00	50	"				
		690.00	1290	"				
		690.00	1289	"				
		690.00	891	"				
		690.00	87	"				
Jan. 20	27	792.00	1292	Wm B. Flesh	Jan. 22	111	1020.00	228.00
"	28	330.00	2784	"	" 22	110	255.00	57.00
"	29	122.10	1203	"	" 22	106	425.00	95.00
"	30	198.00	1204	"	" 22	106	157.25	35.15
"	30	396.00	1201	"	" 22	109	255.00	57.00
"	31	660.00	1206	PC Vafopulo	Feb. 4	113	510.00	114.00
"	32	382.80	1205	Wm B. Flesh	Jan. 22	114	850.00	190.00
"	28	385.25	1209	PC Vafopulo	Feb. 4	107	493.00	111.80
"	29	798.60	1151	"	Feb. 18	115	556.35	171.10
		690.00	203	on hand		119	1028.50	222.90
		690.00	1187	"				
		690.00	823	not del.				
		690.00	1186	on hand				
		690.00	45	"				
		690.00	46	"				
		690.00	49	"				
		690.00	106	"				
no bill			5023	"				
"			5037	"				

The foregoing bill of complaint is marked filed United States District Court, Southern District of New York, March 10, 1920.

## Exhibit A.

Date of Bill of DC & Co. to Weill, F & Co.	Bill No.	Amt of Invoice billed to Weill, F & Co.	Amt of Inv of goods on hand at price billed to Weill, F & Co.	Case No.	Sold by Plaintiff to	Date of Pff's Bill	No. of Pff's Bill	Amt realized by Pff.	Difference in price as billed to Weill, F & Co. & realized by Pff.
Jan. 5	7	381.00		1179	Wm B. Fleisch	Jan. 6	101	510.00	120.00
" "	"	381.00		1180	63 Leonard	" 6	102	510.00	129.00
" "	"	381.99		1181	N. Y. City	" 6	103	510.00	129.00
" "	"	381.00		1182	"	" 6	103	510.00	129.00
" "	"	381.00		1183	"	" 6	103	510.00	129.00
" "	"	381.00		1184	"	" 6	103	510.00	129.00
" "	"	381.00		1185	"	" 6	103	510.00	129.00
" "	"	381.00		1186	"	" 6	103	510.00	129.00
" "	"	381.00		1187	"	" 6	103	510.00	129.00
" "	"	381.00		1188	"	" 6	103	510.00	129.00
Jan. 13	17a	1270.00		204r	Everet Heary Co. on hand	" 13	104	1480.00	210.00
" 14	16		542.80	414	PC Vafopulo	Feb. 4	113	777.00	234.00
" "	18			423	"	" 4	113	777.00	234.00
" "	"			433	"	" 4	113	777.00	234.00
" "	"			520	"	" 4	113	777.00	234.00
" "	"			542.80	"	" 4	113	777.00	234.00
" "	"			542.80	"	" 4	114	777.00	234.00
" "	"			408	not delivd.	" 4			
" "	"			2835	"	" 4			
" "	"			2908	Wm B. Fleisch	Jan. 20	105	850.00	190.00
" "	"			2785	"	" 20	105	850.00	190.00
" "	"			2897	on hand	" 20			
" "	"			2770	"	" 20			
" "	"			2833r	Wm B. Fleisch	Feb. 18	120	850.00	190.00
" "	"			2891	PC Vafopulo	" 4	114	850.00	190.00
" "	"			2684	on hand	" 4			
" "	"			5094	PC Vafopulo	" 4	115	475.55	139.15
" "	"			5003	on hand	" 4			
no bill				5025	"				

*Bill of Complaint.*

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**Subpoena.**

## EQUITY SUBPOENA

THE PRESIDENT OF THE UNITED STATES OF AMERICA,

To David Costaguta, Marcos A. Algiers, Alejandro Sassoli, Eugenio Ottolenghi, individually and as co-partners in business composing the co-partnership of David Costaguta & Company, Renado Taffell and the American-European Trading Corporation,

## GREETING :

YOU ARE HEREBY COMMANDED to appear before the Judges of the District Court of the United States of America for the Southern District of New York, in the Second Circuit, to answer a bill of complaint exhibited against you in the said Court in a suit in Equity, by Henry S. De Rees, and to further do and receive what the said Court shall have considered in this behalf; and this you are not to omit under the penalty on you & each of you of Two Hundred and Fifty Dollars (\$250). 98

WITNESS, Honorable Learned Hand, Judge of the District Court of the United States for the Southern District of New York, at the City of New York, on the 10th day of March, in the year one thousand nine hundred and twenty and of the Independence of the United States of America the one hundred and forty-fourth. 99

ALEX. GILCHRIST, JR.,  
Clerk.

ERWIN, FRIED & CZAKI,  
Plaintiff's Sol'rs.

100

*Bill of Complaint.*

The defendants are required to file their answer or other defense in the above cause in the Clerk's office of this Court, on or before the twentieth day after service hereof excluding the day of said service; otherwise the bill aforesaid may be taken *pro confesso*.

ALEX. GILCHRIST, JR.,

(Seal.)

Clerk.

101

The foregoing subpoena is marked filed United States District Court, Southern District of New York, March 11, 1920.

**Marshal's Returns.**

I HEREBY CERTIFY, that, after due and diligent search, I am unable to find the within named David Costaguta, Marcos A. Algiers, Alejandro Sassoli or Eugenio Ottolenghi, in my district.

THOMAS D. McCARTHY,

U. S. Marshal,

S. D. N. Y.

102

Dated, New York, March 11, 1920.

U. S. District Court,  
filed

March 11, 1920.

S. D. of N. Y.

*Bill of Complaint.*

103

I HEREBY CERTIFY, that on the 10th day of March, 1920, at the City of New York, in my district, I personally served the within subpoena in equity upon the within named defendant Renado Taffell, by exhibiting to him at #22 White St., N. Y. City, the within original, and at the same time leaving with him a copy thereof.

THOMAS D. McCARTHY,  
United States Marshal,  
Southern District of New York.

Dated, March 11, 1920.

104

I HEREBY CERTIFY that on the 10th day of March, 1920, at the City of New York, in my district, I served the within subpoena in equity upon the within named defendant David Costaguta and Company, by exhibiting to Leon Grumet, as agent and attorney in fact, at #22 White St., N. Y. City, the within original, and at the same time leaving with him a copy thereof.

THOMAS D. McCARTHY,  
United States Marshal,  
Southern District of New York. 105

Dated, March 11, 1920.

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*Bill of Complaint.*

I HEREBY CERTIFY that on the 10th day of March, 1920, at the City of New York, in my district, I served the within subpoena in equity upon the within named defendant, the American-European Trading Corporation, by exhibiting to Leon Grumet as President of said corp., at #22 White St., N. Y. City, the within original, and at the same time leaving with him a copy thereof.

THOMAS D. McCARTHY,  
United States Marshal,  
Southern District of New York.

Dated, March 11, 1920.

107

I HEREBY CERTIFY that on the 10th day of March, 1920, at the City of New York, in my district, I personally served the within subpoena in equity upon the within named defendants, David Costaguta, Marcos A. Algiers, Alejandro Sassoli and Eugenio Ottolenghi, by exhibiting to Leon Grumet as agent and attorney in fact for said defts. at #22 White St., N. Y., the within original, and at the same time leaving with him a copy thereof.

THOMAS D. McCARTHY,  
United States Marshal,  
Southern District of New York.

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Dated, March 20, 1920.

The foregoing returns of the Marshal are attached to the subpoena.

**Rule Nisi.**

109

IN THE

DISTRICT COURT OF THE UNITED STATES,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

HENRY S. DE REES,  
Plaintiff,

against

DAVID COSTAGUTA, MARCOS A.  
ALGIERS, ALEJANDRO SASSOLI,  
EUGENIO OTTOLENGHI, indi-  
vidually and as copartners in  
business composing the copart-  
nership of David Costaguta &  
Company, Renado Taffell, and  
the American-European Trad-  
ing Corporation,  
Defendants.

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UPON the bill of complaint filed herein in the office of the Clerk of this Court and the annexed affidavit of Henry S. De Rees, verified the 10th day of March, 1920,

LET the defendants, and each of them, show cause before this Court, at a Stated Term thereof, to be held for the hearing of motions, in the Federal Court House in the Post Office Building, in the City of New York, Borough of Manhattan, on the 19th day of March, 1920, at 10 o'clock A. M. of said

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day, or as soon thereafter as Counsel can be heard, why an order should not be made and entered in the above-entitled action which shall direct:

113 FIRST: That a receiver *pendente lite* be appointed herein of all of the property, assets and effects, of whatever kind, character, nature or description and wherever situated, of the copartnership composed of the plaintiff and the partnership of David Costaguta & Company, and of all of the property, assets and effects of the partnership of David Costaguta & Company, composed of the said David Costaguta, Marcos Algiers, Alejandro Sassoli and  
 114 Eugenio Ottolenghi, which are or have been commingled with the assets of said copartnership, and of all of the property, assets and effects of the defendant American-European Trading Corporation and of the capital stock thereof, and regardless as to whether the said capital stock or any of the property of any of the defendants or of said copartnership is held in the name of said defendants, or in the name of any other person, firm or corporation for them; that said receiver take, hold and administer the property of and liquidate the affairs of the said copartnership; that said receiver take and hold, subject to the further order and judgment of this Court, the property, assets and effects of the said David Costaguta & Company and the American-European Trading Corporation, into which the property, assets and effects of the said copartnership shall be traced, and take and hold, subject to the like order and judgment of this Court, such property and effects, held by each and all of the defendants, to answer to any judgment that may be rendered against them in this suit.

SECOND: That the plaintiff and each and all of the defendants herein, their agents, servants and employees, and each and every other person, firm or corporation having possession, custody or control of any of the property of the said copartnership, or of the property of any of the defendants, in which the same may be converted or commingled, be directed to deliver the same to said receiver, and that all of the defendant copartners and each other person, firm or corporation defendant holding any such property be restrained and enjoined during the pendency of this suit, or until the further order and judgment of this Court, from in any manner, or in any form whatsoever, transferring, assigning or disposing of any of the property of said copartnership, otherwise than to deliver the same to said receiver. 116

AND it appearing to the satisfaction of this Court that the defendants have disposed, and that there is imminent danger that they will continue to dispose of the property of the copartnership and the property of the defendants in which the property of the copartnership has been commingled, as well as their own property now within the jurisdiction of this Court, in derogation of the rights and remedies of the plaintiff, it is hereby

ORDERED, that the defendants David Costaguta, Marcos Algiers, Alejandro Sassoli and Eugenio Ottolenghi, individually and as copartners composing the firm of David Costaguta & Company; Leon Grumet, as the agent and attorney in fact of the said David Costaguta & Company; the defendant Renado Taffell; the servants, agents or attorneys 117

*Rule Nisi.*

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of the said David Costaguta & Company, or of the individual members thereof, the American-European Trading Corporation, its officers, agents, servants and employees, or any other person, firm or corporation having possession, custody and control of any of the property of the copartnership composed of the plaintiff and said David Costaguta & Company, or having possession, custody and control of the property of the said defendant American-European Trading Corporation, be and they hereby are jointly and severally enjoined and restrained, pending the hearing and determination upon the return of this rule *nisi*, from in any manner or form whatsoever, interfering with, assigning, transferring or disposing of, or removing from the jurisdiction of this Court, any property of any kind, character, nature or description whatsoever, and wheresoever situate, belonging to the defendants or either of them, or belonging to the said copartnership. And further sufficient cause appearing therefor,

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LET SERVICE of this rule *nisi*, together with a copy of the bill of complaint and the affidavit hereto annexed, on such of the defendants as may be found within this District on or before the 13th day of March, 1920, be deemed sufficient.

120 Dated. New York, March 10th, 1920.

LEARNED HAND,  
*United States District Judge.*

A true copy of an order issued March 10th, 1920.

(Seal) ALEX. GILCHRIST, JR.,  
Clerk.

**Affidavit of Henry S. De Rees.**

121

IN THE

DISTRICT COURT OF THE UNITED STATES,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

HENRY S. DE REES,  
Plaintiff,

against

DAVID COSTAGUTA, MARCOS A.  
ALGIERS, ALEJANDRO SASSOLI,  
EUGENIO OTTOLENGHI, indi-  
vidually and as copartners in  
business composing the copart-  
nership of David Costaguta &  
Company, Renado Taffell, and  
the American-European Trad-  
ing Corporation,  
Defendants.

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STATE OF NEW YORK,  
CITY AND COUNTY OF NEW YORK, } ss.:  
SOUTHERN DISTRICT OF NEW YORK, }

HENRY S. DE REES, being duly sworn, deposes  
and says:

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I. That he is a citizen of the United States, hav-  
ing been born in Blueearth County, State of Min-  
nesota, on the 16th day of May, 1874, and that he  
now resides at Glen Ridge, in the State of New

*Affidavit of Henry S. De Rees.*

Jersey, and has been a resident of the City, County and State of New York for many years prior to the 15th day of May, 1919.

II. That your deponent for many years, has been engaged as a merchant in the purchase and sale of hosiery, both in the United States and in foreign markets, principally in South and Central America, and that he is now engaged in the business of buying and selling hosiery and that he has an office and place for the transaction of his business in the City and County of New York, District aforesaid.

125 III. That in or about the month of April, 1915, your deponent entered into a contract of copartnership with one David Costaguta and Marcos A. Algiers, who then were copartners in business under the firm name and style of David Costaguta & Company, and engaged in general merchandising in the City of Buenos Aires, Republic of Argentine. That the said David Costaguta then was and now is a citizen and subject of the Kingdom of Italy, and a resident of the City of Buenos Aires, Republic of Argentine, and that the said Marcos Algiers then was and now is a citizen of the Republic of France and a resident of the City of Buenos Aires, Republic of Argentine.

126 IV. That in and by said contract thus entered into between your deponent and said David Costaguta & Company, as thus constituted, it was provided that a copartnership shall be and thereby was established and created for the purpose of buying and selling hosiery, said copartnership business to

be conducted in the name and upon the premises of said David Costaguta & Company, in the City of Buenos Aires, Republic of Argentine, and elsewhere, as may be agreed upon, the said David Costaguta & Company to contribute from time to time, and as the same might be required, all of the capital necessary to conduct the said business, and your deponent was to have entire control and direction of the conduct and management of the said business, the purchase and sale of its merchandise and the profits earned in said business were to be divided equally and the losses sustained and borne in the same proportion.

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V. That your deponent has conscientiously searched among all of his papers and effects for his copy of said copartnership agreement, but has been unable to thus far locate the same, and verily believes that the same is among certain of his effects deposited in the City of Buenos Aires, Argentine, but that the terms and conditions of said agreement as hereinbefore averred, are accurately alleged in substance and effect.

VI. That said copartnership continued uninterrupted from about the month of April, 1915, to and including the 31st day of October, 1917, during which period the said copartnership engaged in large and lucrative transactions and resulted in earning large profits and in accumulating a large and valuable stock of merchandise.

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VII. That in or about said month of October, 1917, and as of the 31st day of said month, the said

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firm of David Costaguta & Company was reconstituted by the admission therein, as partners, the defendants Alejandro Sassoli and Eugenio Ottolenghi, the former of whom then was and now is a citizen and subject of the Kingdom of Italy and a resident of the City of Buenos Aires, Republic of Argentine, and the latter of whom then was and now is a citizen of the Republic of Argentine and a resident of the City of Buenos Aires. That as a result of the dissolution of the prior partnership of David Costaguta and the creation of the new partnership by the admission of the additional partners therein, the copartnership between your deponent and the old partnership of David Costaguta & Company was dissolved, and a new contract of copartnership was duly made and entered into between your deponent and the said firm of David Costaguta & Company, as thus reconstituted, in the City of Buenos Aires, Argentine Republic, dated November 1st, 1917, wherein and whereby, in substance and effect, it was agreed, as follows:

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(a) That a special section, business and enterprise shall be established, to be conducted on the premises and in the name of David Costaguta & Company, in the City of Buenos Aires, Argentine Republic and elsewhere, as may be agreed upon, for the purchase and sale of hosiery, and any other articles of knit goods or any other kind of merchandise which it may, by mutual accord, be agreed to buy, sell or deal in, said special section to be known and called the "Hosiery Section."

(b) That your deponent was to have the exclusive charge of and the right to make all the pur-

chases of the merchandise dealt in, except, that the said David Costaguta & Company reserved the right to require your deponent to submit for approval all purchases that he made while in Buenos Aires, but that as to all purchases your deponent made while in North America or Europe he was to have complete liberty of action within the limits which said David Costaguta & Company may fix in writing.

(c) That your deponent shall have exclusive charge of the sale of said merchandise purchased in the business of said copartnership, said David Costaguta & Company reserving the right only to pass upon the credits and terms of sale. 134

(d) That only such expenses shall be charged to the business of said copartnership as directly belonged to it, that is to say, the salary of its own employees directly and exclusively concerned in the conduct of its business, travelling expenses, commission paid to brokers, telegrams, postage and such other incidental expense directly connected with the business of said copartnership, whereas, it was agreed that the expense of rent, light, heat, licenses, taxes, salaries of bookkeepers, clerks or accountants engaged in and about the keeping of the books, records and accounts of said copartnership, porters and laborers who handle, pack, unpack, load and unload, carry or otherwise handle the merchandise of the copartnership, shall be charged exclusively to the individual account of said David Costaguta & Company. 135

(e) That on the 31st day of October in each year, the accounts and transactions of said copart-



nership shall be balanced, and the profits or losses, as the case may be, shall then be ascertained and determined, and in so doing such depreciation in the market value of the merchandise shall be made as may be mutually agreed upon and as shall be found to be convenient or necessary to be made, and such bad or doubtful debts shall be charged off as may, by mutual accord, be agreed upon.

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(f) That from the net profits so mutually ascertained there shall be deducted and paid to said David Costaguta & Company, a sum equal to 6% per annum interest on the amount of the net capital supplied by David Costaguta & Company to and actually used by, the copartnership in the business of the said Hosiery Section, said interest calculations and ascertainment of and capital employed to be made semi-annually by a semi-annual account current evidencing all advances and disbursements made by David Costaguta & Company to or for the benefit of the copartnership and all moneys received by the said David Costaguta & Company belonging to said copartnership together with interest at 6% per annum debited on said advances and credited on said receipts, and in case the profits at the end of any one year are insufficient to repay to said David Costaguta & Company the net amount of said capital advanced and so ascertained, that then said balance shall be carried over into the succeeding balance.

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(g) That all net profits so mutually ascertained and determined as hereinbefore averred in subdivision (f) of this affidavit, shall be divided 55%

thereof to the said David Costaguta & Company and 45% thereof to your deponent, and all losses incurred shall be divided, sustained and borne in the same proportion.

(h) That your deponent shall be entitled to draw and be paid monthly, from the funds of said copartnership, a sum equal to 1500 Argentine pesos, which shall be charged to his personal account and he shall, in addition thereto, be entitled to draw and be paid from time to time 50% of his share of all such net profits as and when ascertained and determined, leaving 50% of his net profits on deposit with said David Costaguta & Company, on which it was to pay your deponent 6% interest per annum; and which deposit they were to hold as security, so far as provided for under the terms of the contract, and to be utilized by it as capital advanced to the copartnership and to be accounted for and paid over to your deponent at and on the termination of said contract relation.

(i) That your deponent shall devote his undivided time and attention to the business of said copartnership and he will not directly or indirectly, participate in any other commercial business nor shall he be interested in any other commercial business foreign to the business of the said copartnership; and in the event of a breach upon the part of your deponent of this provision of said contract, the said David Costaguta & Company reserved the right to declare forfeited the profits earned by your deponent in the fiscal year in which said breach of this covenant occurred.

(j) That both parties reserved the right, upon three months' written notice by registered mail, to terminate said copartnership and revoke said contract, and in the absence of your deponent from Buenos Aires said David Costaguta & Company, should they desire to terminate said contract, will do so by cable, addressed to your deponent at the last address indicated by him.

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(k) That in the event your deponent or said David Costaguta & Company elected to and did terminate said copartnership and revoke said contract, either of said parties had the right to demand that the affairs of said copartnership shall be jointly liquidated by the sale of the merchandise on hand, in the Custom House, in transit, or in course of manufacture and pertaining to the business of said copartnership, and your deponent agreed to continue his co-operation, so far as necessary, in and about said liquidation up to the time when all of the said merchandise shall have been entirely sold, at which time adjustments were to be made as to the value of merchandise taken over, if any, or bad debts, as might be fixed by mutual accord, as in case of the ascertainment of profits under the provisions of annual settlements as hereinbefore set out in sub-division (e) of this paragraph, and

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thereupon said David Costaguta & Company were to take over and become the sole owner of all of the assets of the copartnership, paying to your deponent the sum realized as the result of said liquidation, to which your deponent is entitled in said copartnership property so liquidated, in four equal installments; the first installment immediately in

cash and the remaining three installments in six, twelve and eighteen months thereafter, together with interest thereon at 6% per annum.

(l) That in the event either party shall terminate said copartnership and revoke said contract by notice and in the further event a liquidation of the said merchandise and property of the said copartnership is not demanded by either party as provided by the article of said contract numbered 11, as averred in sub-division (k) of this paragraph, and the said David Costaguta & Company desire to become the sole owner of the business of the said copartnership and its assets without liquidation, then and in those events, a balance shall be mutually arrived at and determined as provided in Article "5" of said contract and as averred in sub-division (e) of this paragraph, relative to adjustment of merchandise values and credits, and the said David Costaguta & Company shall thereupon take over all of the assets and assume all of the liabilities and pay to your deponent the amount so found to be due to him in four equal installments, the first immediately in cash and the remaining three installments in six, twelve and eighteen months thereafter together with interest thereupon at 6% per annum.

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(m) That in the event of the death of your deponent the said David Costaguta & Company being the surviving partner, shall thereupon liquidate the entire stock of merchandise of the copartnership within one year from the day of such death, and close and balance the accounts thereof, and pay to

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the heirs of your deponent the amount so found to be due to him in four equal installments, the first immediately in cash and the remaining three in six, twelve and eighteen months thereafter, together with interest at 6% per annum.

(n) That in order to avoid possible confusion it was agreed that the business of said copartnership was to have no relation to the production of hosiery of the factory of David Costaguta & Company known as "La Tejedora."

149 That hereto annexed, marked Exhibit "A," is a copy of the said contract transcribed in Spanish, the language in which the said contract was made, together with a translation thereof into English, marked Exhibit "B," both of which are herein referred to with the same force and effect as though herein set out *in extenso*.

150 VIII. That on the said 1st day of November, 1917, the reconstituted partnership of David Costaguta & Company assumed all of the liabilities and took over all of the assets of the prior partnership of David Costaguta & Company, and the said new partnership of David Costaguta & Company, under date of November 1st, 1917, duly published and declared the dissolution of the old firm and the assumption by the new firm of the liabilities, and the taking over of all of the assets of the old firm, as appears more particularly by a copy of said publication and notice, which is hereto annexed, marked Exhibit "C," together with the English translation thereof marked Exhibit "D," and to which refer-

ence'is herein made with the same force and effect as though herein set out *in extenso*.

IX. That the copartnership established and created between your deponent and the firm of David Costaguta & Company as then reconstituted and as evidenced by said contract Exhibit "A," hereto annexed, duly assumed all of the liabilities of the copartnership theretofore existing between your deponent and the said David Costaguta & Company as then constituted, and took over all of the assets thereof. That on the 1st day of November, 1917, the merchandise then on hand and so taken over aggregated in value the sum of 302,332.18 Argentine pesos, and there was to the credit of your deponent in his capital account a cash balance of 31,253.99 Argentine pesos. That, in addition to the merchandise then on hand, there were large outstanding contracts for the purchase of merchandise deliverable in the future and which was delivered to said copartnership subsequent to the 1st day of November, 1917.

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X. That all of the books, records, documents and accounts of the transactions of the business of the copartnership, both under the contracts of April, 1915, and November 1st, 1917, were kept by the said David Costaguta & Company in the City of Buenos Aires by its bookkeepers and accountants, and all of the books, records and documents relating to the transactions of the business of said copartnership pursuant to said contract of November 1st, 1917, are now in the City of Buenos Aires, in the possession, custody and control of the said David

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Costaguta & Company, except the books, records and documents with reference to some of the transactions of said copartnership in the City of New York, and to which reference will hereafter be more particularly made.

155 XI. That on or about the 28th day of November, 1917, your deponent, in furtherance of the business of the said copartnership, left the City of Buenos Aires and arrived in the City of New York on the 28th day of December, 1917, since which date he has continuously resided in the United States, and has been engaged in the business of the copartnership until the termination of the contract as hereinafter stated. That since deponent's departure from the City of Buenos Aires he has had no inspection or examination of the books, records and documents of the said copartnership, as kept by the said David Costaguta & Company, in the City of Buenos Aires, otherwise than that your deponent has, from time to time, and as hereinafter more particularly alleged, received statements from said David Costaguta & Company relating to some of the fiscal transactions of the business of said copartnership. That while your deponent was in Buenos Aires and for a few months subsequent to his arrival in the City of New York, it was the custom and practice of the said David Costaguta & Company to furnish your deponent with daily statements evidencing the detailed record of the sales made by the said copartnership in the conduct of its business, but that since about the month of September, 1918, said David Costaguta & Company has failed, refused and neglected, although frequently

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demanding so to do, to furnish your deponent with details of such sales. That the said David Costaguta & Company, although frequently demanded by your deponent so to do, have likewise failed and refused and neglected at any time subsequent to the 1st day of November, 1917, to furnish your deponent with the semi-annual account current of receipts and disbursements and calculations of interest evidencing the capital claimed to have been advanced by the said David Costaguta & Company in the conduct of the said business, as provided for by Article 5 of said contract Exhibit "A," hereto annexed, and your deponent has at no time since said 1st day of November, 1917, had or received from said David Costaguta & Company, or from any other source, any knowledge or information as to the details of the fiscal accounts and transactions of the said copartnership or of your deponent's individual account therewith, except as hereinafter more particularly alleged.

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XII. That from said 1st day of November, 1917, to and including the 31st day of November, 1918, your deponent, on behalf of the said copartnership, purchased in the United States merchandise of the value in excess of 2,000,000 Argentine pesos, which, with the merchandise on hand on November 1st, 1917, of the value of 302,332.18 Argentine pesos and the merchandise delivered upon contracts entered into prior to the 1st day of November, 1917, was in large part sold by your deponent during that year in Argentine and elsewhere, realizing large profits and leaving on hand unsold in the City of Buenos Aires on the 31st day of October, 1918,

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merchandise of the value of not less than 1,321,923.26 Argentine pesos.

161 XIII. That on or about the 31st day of January, 1919, your deponent received from the said David Costaguta & Company, from the City of Buenos Aires, a letter hereto annexed, marked Exhibit "E," together with a translation thereof marked Exhibit "F," and to which reference is herein made with the same force and effect as though herein set out *in extenso*. That there was inclosed with said letter a statement of the so-called profit and loss account of said copartnership as of October 31st, 1918, and with reference to the transactions of the said copartnership for the year 1917 to 1918, which is hereto annexed, marked Exhibit "G," together with the translation thereof marked Exhibit "H," to which reference is made with the same force and effect as though herein set out *in extenso*. That said statement purports to debit said account with the value of the merchandise on hand belonging to the said copartnership on and as of the 1st of November, 1917; the merchandise thereafter purchased and received, commissions paid for the sale of merchandise, expenses incurred in Buenos Aires and New York, bad debts, interest on the capital advanced by David Costaguta & Company, and  
 162 other items aggregating a total of 2,731,795.23 Argentine pesos, and crediting said account with the total sales made in said period aggregating 1,626,202.04 Argentine pesos, to which, in addition to other items, there is added 1,321,993.26 Argentine pesos, as representing the value of the merchandise on hand on and as of the 31st day of Oc-

tober, 1918, making a total of credits of 2,974,866.40 Argentine pesos, leaving a balance between the debits and the credits of 243,270.17 Argentine pesos as representing the profits claimed to have been realized in the conduct of said business during said period, of which 55% thereof or 133,798.59 pesos are credited to the said David Costaguta and 45% thereof, to wit, 109,471.58 Argentine pesos, are credited to your deponent. That otherwise than said letter and said statement, your deponent at no time received from said David Costaguta & Company any information as to the fiscal transactions of said copartnership during said period. That, although your deponent frequently demanded a detailed statement of all of the receipts and disbursements and a detailed statement of the sales covering said period, the said David Costaguta & Company never furnished the same to your deponent, and refused and neglected so to do. That your deponent objected to the balance and ascertainment of the profits as shown in said statement Exhibit "G." and objected and protested to the method and manner in which said statement was rendered and the balance arrived at; that he objected and protested to the items, among others, appearing upon the debit side of said statement of commissions paid to representatives aggregating 32,886.09 Argentine pesos; the item representing expenses in Buenos Aires and New York aggregating 57,840.24 Argentine pesos, the item representing interest on the capital advanced to the said copartnership by the said David Costaguta & Company, aggregating 39,745.59 Argentine pesos, demanding the detailed items thereof, but the said David Costaguta & Com-

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pany failed and refused so to do. That said statement of said profits was not mutually arrived at or ascertained in accordance with said contract.

- XIV. That also with said letter Exhibit "E" and said profit and loss statement Exhibit "G," as hereto annexed, there was enclosed a statement of your deponent's alleged personal account, which is hereto annexed, marked Exhibit "I," together with the translation thereof, marked Exhibit "J," to which reference is herein made with the same force and effect as though herein set out *in extenso*. That said statement purports to charge your deponent with divers sums claimed to have been received by him or advanced for his account during the period between November 1st, 1917, and October 31st, 1918, including the sum of 54,735.79 Argentine pesos, one-half of the alleged balance representing your deponent's share in the profits of said business realized that year, making a total of charges and withdrawals, including said alleged profit of 146,148.26 Argentine pesos. That said so-called personal account was credited with the cash capital of your deponent on the 1st of November, 1917, to wit, the sum of 31,253.99 Argentine pesos, divers sums, including your deponent's expenses incurred in the City of New York, and the sum of 109,471.58 Argentine pesos, representing his alleged profits during that year, making a total of credits of 161,700.73 Argentine pesos, leaving a balance to your deponent's capital account of 15,552.47 Argentine pesos, from which was deducted 14,025.57 pesos, representing the total profits realized on certain sales made by your deponent in the City of

New York, leaving a net balance of 1,526.91 pesos.

That your deponent objected to said statement of his so-called personal account and protested against the inclusion therein of numerous items and to the balance as therein stated, but that no corrections of said account were made by the said David Costaguta & Company, nor were any of said items changed or altered to meet the objections and protests made by your deponent.

XV. That in or about the month of January, 1918, your deponent opened an office and place for the transactions of the business of the copartnership at No. 395 Broadway, in the City of New York, in the Borough of Manhattan, and thereafter in the following October removed said office and place of business to No. 22 White Street, in said City, which continued to be and was the place of business of said copartnership until the events as hereinafter alleged. That during the period between October 31st, 1918, and October 31st, 1919, your deponent purchased large quantities of merchandise in the United States for the benefit of said copartnership and placed said merchandise as the same was delivered, in the premises of the copartnership in New York City and in warehouses in said City, and there was on hand unsold on said last mentioned day merchandise of the value of about \$750,000. That there was also at said time due to the said copartnership on contracts large quantities of merchandise not yet delivered. That of the merchandise purchased during said period approximately \$500,000 thereof was shipped to the copartnership for sale in Argentine, Bolivia, Chili, Uruguay and

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elsewhere, most of which your deponent believes has been sold and large profits realized therefor. That upon the merchandise sold by your deponent in the City of New York during said year and subsequent thereto, net profits aggregating about \$125,000 was realized. That all of the merchandise sold by your deponent in the City of New York except as hereinafter alleged, was sold in the name of David Costaguta & Company, and the proceeds thereof received by it for the benefit of said copartnership.

- 173 XVI. That in or about the month of April, 1918, the said David Costaguta & Company sent a representative, one Gillespie Brunago, to the United States, where he arrived in the City of New York on or about May 15th, 1918; that said David Costaguta & Company, contrary to the contract, Exhibit "A," hereto annexed, invested him, by power of attorney, with authority to supersede and displace your deponent in the active conduct and management of the business of the copartnership. That the said Brunago assumed to and did control, supervise, hamper and impede your deponent in the purchase and sale of the merchandise of the copartnership; that he assumed to and did instruct and direct the employees thereof, contrary to the instructions and directions given them by your deponent; that he endeavored to cancel and rescind contracts made by your deponent with manufacturers for the sale and delivery of merchandise which had been entered into with the full approval and knowledge of the said David Costaguta & Company, and that he sold merchandise over the pro-
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test and objection of your deponent, necessitating that your deponent cancel said sales and refuse to make deliveries. That the said Brunago opened books of account of the transactions conducted by said copartnership in the City of New York, but that said books of account were improperly kept, did not accurately record such transactions, and such books were so badly kept that it became necessary, about the first of June, 1919, to have all of said books of said copartnership re-written in order that they might truly record the transactions of said copartnership. That your deponent protested to the said David Costaguta & Company regarding the acts and conduct of the said Brunago, with the result that finally, in September of 1918, the said Brunago was discharged and left the employ of the said copartnership. That during the period when said Brunago was in the employ of said David Costaguta & Company he was also engaged in transactions of business for said David Costaguta & Company respecting other branches of their business, and did not devote his time exclusively to the business of the copartnership in which your deponent was interested.

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XVII. That in or about the month of May, 1919, the defendant Eugenio Ottolenghi, arrived in the City of New York and advised your deponent that, on behalf of David Costaguta & Company, he intended to sell and dispose of all of the merchandise of the said copartnership; that the said David Costaguta & Company had invested in the business of said copartnership more capital than it wished to employ therein, and that said merchandise must be

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sold regardless of the prices realized therefor, and instructed your deponent to dispose of said merchandise at the best price obtainable, regardless of the interests of your deponent, or as to whether said merchandise realized a profit or not. That shortly prior to the arrival of the said Ottolenghi in the City of New York, your deponent was taken seriously ill with influenza and remained confined to his bed and home until about the 1st day of June, 1919, during which period the said Ottolenghi sold large quantities of the merchandise of said copartnership below cost and at large losses to said copartnership, and your deponent. That upon the return of your deponent to the business of the copartnership he protested and objected to the sacrifice of said merchandise by said Ottolenghi and deponent refused to permit any more of said merchandise to be sold at a loss, and insisted that the property of the copartnership should be sold in regular course of trade at market values, in order to realize the large profits that could be made thereon if the same were sold in the regular course of business, and accordingly from then on and until the termination of said copartnership contract none of the merchandise of the said copartnership was sold, except at a profit, and large profits were realized, except in one or two instances of comparatively no importance. That the said Ottolenghi assumed to and did, over the protests of your deponent, cancel contracts for the purchase of merchandise made by your deponent in the name of the said copartnership, the purchase of which it had knowledge of and had approved, resulting in the fact that litigations were instituted, causing losses to the said copart-

nership, which were totally unnecessary and could have been avoided.

XVIII. That at no time did your deponent receive from said David Costaguta & Company any details of the sales made by it in the conduct of the business of the said copartnership in Buenos Aires for the year beginning November 1st, 1918, and ending October 31st, 1919, although your deponent frequently demanded the same, nor did your deponent receive from said David Costaguta & Company any reports, statements or accounts of the fiscal transactions in Buenos Aires of said copartnership for that period, and has never, although frequently demanding the same, received the semi-annual account current provided for by said contract, evidencing the amount of capital alleged to have been advanced by the said David Costaguta & Company, or the interest on said capital.

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XIX. That the said Ottolenghi during all of the time when he was in the City of New York, assumed to and did interfere with, impede and supersede your deponent in the active conduct, management and direction of the business of the said copartnership. That he refused to pay or permit the said David Costaguta & Company to pay many of the bills for the purchase of merchandise made by your deponent, necessitating in frequent instances threats of suits and actions at law by said creditors before said purchases were paid for, and several of the factories and mills with whom the said copartnership had contracts for the sale and delivery of merchandise to be delivered in the future cancelled

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said contracts and refused to make further shipments by reason of the failure of the said Ottolenghi to pay for said merchandise on the due date, with the result that said copartnership suffered large and substantial losses by reason of such cancellation of said contracts. That the said Ottolenghi frequently threatened to close up said place of business of said copartnership, discontinue the sale of merchandise therein, and refused to advance to your deponent necessary moneys or pay him for the expense to which he was put in the conduct thereof, and otherwise created a feeling of hostility and friction which made it impossible for your deponent to conduct the said business to the best interests of the said copartnership.

XIX. That by reason of said situation as hereinbefore alleged, your deponent did on the 22nd day of August, 1919, notify the said David Costaguta & Company at Buenos Aires, and give 90 days formal written notice terminating said copartnership, to take effect on and as of the 22nd day of November, 1919. That on the 19th day of September, 1919, the said David Costaguta & Company accepted the termination and cancellation of said contract and thereafter on the 10th day of November, 1919, your deponent elected to and did demand a complete liquidation of all of the merchandise belonging to the said copartnership pursuant to Article 11 of said contract (Exhibit "A" hereto annexed), and gave to said David Costaguta & Company formal written notice to that effect, to which on November 14th, 1919, said David Costaguta & Company formally agreed in writing. That hereto annexed.

marked Exhibit "K," is a copy of the letter addressed by your deponent to said David Costaguta & Company electing a complete liquidation of said merchandise, and hereto annexed, marked Exhibit "L," is the letter of the said David Costaguta & Company agreeing to said liquidation.

XX. That on the 22nd day of November, 1919, the date when the copartnership terminated pursuant to the notice theretofore given by your deponent, there was on hand and unsold in the City of New York merchandise of the value of about \$100,000. That at said time your deponent had made contracts for the sale of merchandise which had not yet been purchased by said copartnership and which it was necessary for said copartnership to purchase in order to fulfill its said contracts of sale. That although deponent frequently requested the said David Costaguta & Company to permit your deponent to purchase merchandise necessary to fulfill outstanding contracts, the said David Costaguta & Company refused to permit your deponent so to do, and your deponent was compelled to individually purchase merchandise necessary to fulfill some of said contracts and delivered the same at losses to himself.

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XXI. That the said David Costaguta & Company refused to permit your deponent to sell said merchandise remaining on hand after the termination of said contract in the regular course of trade and at the best prices obtainable therefor, and over the protests and objections of your deponent instructed

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and demanded that he sell the same at any price that could be realized therefor, and large quantities of merchandise were sold at little or no profit, and in some instances at a loss and far below the market value then ruling for merchandise of the same kind and character.

191 XXII. That during the period between the 22nd day of November, 1919, and the 1st day of February, 1920, or thereabouts, the said copartnership had to its credit in bank in the name of said David Costaguta & Company large funds and large outstanding accounts due to it for the sale of merchandise theretofore and in that period made, and the said David Costaguta & Company, on transactions disconnected with the business of the copartnership in which your deponent was interested, likewise had large funds on deposit to its credit in the City of New York, and that the funds of said copartnership in which your deponent is interested were commingled with the funds of the said David Costaguta & Company by them arising out of transactions other than those of the copartnership, all of which were deposited, in various amounts and at various times, in the National City Bank, The Foreign and American Banking Corporation, The Citizens Central National Bank, the Italian Discount & Trust Company, and the Guaranty Trust Company, all of  
192 the City of New York, in the Southern District of New York, and in the Central Trust Company of New Jersey, in the City of Jersey City, N. J.

XXIII. That in addition to the moneys to the credit of the said copartnership and of the said

David Costaguta & Company, as aforesaid, the said David Costaguta & Company had title, possession, custody and control of large assets consisting of merchandise, other than merchandise belonging to the copartnership, among which were 9091 hides, which are now, as your deponent is informed and verily believes, stored in warehouses in the City of New York, Southern and Eastern District of New York, as follows:

1991, marked C/KF/KR, dry hides, located in the Coastwise Warehouse Company, 656 West 30th St., New York;

1000 dry hides, marked CLA, located in the warehouse as above mentioned; 194

100 wet salted hides, marked DCC, located in the same warehouse;

1000 Horse hides, located in the warehouse of H. I. Steitler, Inc., 82-84 Bank Street, in the City of New York;

3000 dry hides, located in Sullivan's Warehouse, 109 Cliff Street, New York City; and

2000 dry hides, located in the New York Dock Company, Store 249, foot of Pierrepont Street, Brooklyn, New York.

That all of said hides are, as your deponent is informed and verily believes, of the value of about \$150,000 and came into the possession of the said David Costaguta & Company by the use of the funds of the copartnership in which your deponent was interested and under the following circumstances: 195

XXIV. That said hides were purchased by Messrs. Gaston, Williams & Wigmore and others in

the City of Buenos Aires from the said David Costaguta & Company and were paid for by the purchasers. Upon the arrival of said hides in the City of New York they were rejected by the purchasers and demand made for the return of the purchase money upon the ground that the hides were not as represented. David Costaguta & Company refused to return the purchase money or take back said hides, whereupon all of the purchasers, three in number, instituted attachment proceedings against said David Costaguta & Company, in the City of New York, and levied upon all of the property of the said David Costaguta & Company and all of the property of the copartnership in which your deponent was interested, the Sheriff of the City and County of New York taking possession and remaining in possession of such property for a period of more than two weeks, tying up the liquidation of the affairs of the copartnership and the funds to its credit in its several bank accounts. Thereupon and in order to release the levy of the said attachments and to permit the continuation of the liquidation and the affairs of the said David Costaguta & Company, it applied all of the moneys in its possession representing the sales of the property of the copartnership in which your deponent was interested, together with other moneys which it raised upon loans with banks, to the discharge of said attachments and paid the claims of the purchasers of said hides, taking over the said hides and storing the same in the warehouses as above mentioned. That in all there were four separate and distinct attachment proceedings instituted against the property

of the copartnership and of said David Costaguta & Company, of which one grew out of transactions concerning the copartnership business in which your deponent was interested, and all were released by the payment in full of the claims of the plaintiffs therein by and with such commingled funds.

XXV. That in the month of January, 1919, your deponent became cognizant of the fact that the said David Costaguta & Company had conceived the fraudulent scheme and design to transfer and convey all of its property and all of the property and assets of the copartnership in which your deponent was interested to a corporation for the purpose of impeding and impairing your deponent in the prosecution of his legal rights and remedies and to prevent him from collecting from the property, assets and effects in its possession in the jurisdiction of this Court the moneys justly due to him growing out of the transactions under and by virtue of the contract of partnership (Exhibit "A" hereto annexed). That deponent had reported to said David Costaguta & Company between the 6th and 29th days of January, 1920, sales of sixty-five cases of hosiery to one Weill, Feinberg & Co., Inc., a customer of said copartnership and with whom he had been and was in negotiation for the sale thereof. That said sales to said Weill, Feinberg & Co., Inc., were never in fact consummated, and for which merchandise he had instructed the New York office of David Costaguta & Company, in whom actual custody of the same was held for the account of the said copartnership, to make out invoices to said

Weill, Feinberg & Co., Inc., and deliver the same to your deponent, and the invoices were so made out and delivered to him, but that said invoices were never rendered by deponent to said Weill, Feinberg & Co., Inc., with whom said negotiations for said sales failed. That your deponent, being cognizant of the fraudulent scheme of said David Costaguta & Company to place all of the assets of said copartnership beyond his control and to transfer them to a dummy corporation in violation of his rights, and to prevent the same, so far as he was able, deponent took over and stored in his own name for the account of said copartnership said merchandise so invoiced to said Weill, Feinberg & Co., Inc. That your deponent has, in the regular course of trade, sold thirty-two cases of said merchandise and realized therefor the sum of \$20,840.65, said merchandise having been sold at a profit of more than \$5,000 over and above the price at which the same was billed to said Weill, Feinberg & Co., Inc., and that your deponent still holds unsold thirty-three cases of said merchandise. That all of the proceeds realized upon the merchandise so sold by your deponent and the remaining merchandise unsold by your deponent he holds for the benefit of the said copartnership, subject to an accounting and to the order of this Court, and deponent thereby tenders and offers to deliver said merchandise to a Receiver to be appointed herein, and to account for said moneys or pay the same to said Receiver, as the Court may direct, less whatever expenses were incurred by your deponent in the sale, storage and delivery thereof. That annexed to the Bill of Complaint

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filed herein and marked Exhibit "A" is a complete and detailed schedule of said sixty-five cases of merchandise, indicating those still held and unsold by your deponent and those sold and disposed of, giving the names and addresses of the persons to whom said merchandise was sold and the amounts realized therefor, and reference is hereby made to said Schedule with the same force and effect as though the same were made a part hereof.

XXVI. That in or about the month of January, 1920, the said David Costaguta & Company, by and through the said defendant Eugenio Ottolenghi, in pursuance of said fraudulent scheme and conspiracy as aforesaid, caused to be incorporated on or about the 31st day of January, 1920, the defendant American-European Trading Corporation under the laws of the State of New York with dummy incorporators and dummy directors. That the authorized capital stock of the said corporation, the American-European Trading Corporation, was \$10,000, with shares of the par value of \$100 each, and the capital with which it was to begin business was stated in its Articles of Incorporation at \$500. That the number of its directors was to be and is three, who need not be nor are they actually stockholders. That the incorporators therein named, to wit, Robert Lowenstein, Sr., Arthur Delafield Smith, Vinnie I. Jones, Nathan Levy and Alexander Gritzner, agreed to take one share each of said stock in said corporation, and the directors for the first year, named in said certificate, were the said Robert Lowenstein, Sr., Arthur Delafield Smith and Vinnie I.

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Jones. That all of the capital stock of said American-European Trading Corporation is now owned and held by the said David Costaguta & Company, except the necessary qualifying shares held by some of the dummy directors and incorporators, but that such incorporators paid nothing of value for the stock so held by them.

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XXVII. That immediately after the organization of said defendant corporation the said David Costaguta & Company, in furtherance of said fraudulent scheme and conspiracy, did, on or about the 1st day of February, 1920, and thereafter, transfer, convey and set over to said defendant corporation all of the property, merchandise, assets and effects, cash in hand and in bank, belonging to the copartnership in which your deponent was interested, and as well that belonging to the said David Costaguta & Company, and, as alleged consideration for such transfers and conveyances, all of the stock of the said American-European Trading Corporation was issued and delivered to the said David Costaguta & Company. That said transfers were made by the said David Costaguta & Company to the said defendant American-European Trading Corporation without any actual consideration therefor otherwise than by the issuance by said corporation of its said capital stock. That the said David Costaguta & Company closed and discontinued all of its bank accounts and the large sums of money so withdrawn were thereupon deposited in part to the credit of the said defendant corporation and part in the name of the defendant Renado Taffell, who since said

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transfer has been discharging the same in his individual name for the benefit and account of the said respondent corporation and the said David Costaguta & Company.

XXVIII. That there is now in the possession, custody and control of the said defendant the American-European Trading Corporation, and located in the City of New York, in the Southern District of New York, twenty-two cases of merchandise consisting of hosiery, the property of the copartnership, of the value of about \$15,000, which the said David Costaguta & Company, among other assets, transferred, set over and conveyed to the said defendant the American-European Trading Corporation as aforesaid. That all of the accounts outstanding due for the sale of hosiery and made by the said copartnership, aggregating many thousands of dollars, were likewise transferred, set over and conveyed by said David Costaguta & Company to said defendant corporation. That there was likewise transferred to said defendant corporation the said 9,091 hides of the value of about \$150,000 as aforesaid which your deponent is informed and believes are now in its possession, custody and control. That the said David Costaguta & Company also transferred to said corporation a certain contract for the sale and delivery of 20,000 dozen of hosiery, of which 19,500 dozen remain undelivered, of the contract price of \$20,900, made with the Loudon Hosiery Mills of Loudon, Tennessee; a contract for the sale and delivery of 20,000 dozen of hosiery, of which 11,000 dozen remain undelivered, of the contract

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price of \$14,850, and a contract for the sale and delivery of 10,000 dozen of hosiery, of which 900 dozen remain undelivered, of the contract price of \$1,665, made with the Sweetwater Hosiery Mills of Sweetwater, Tennessee; a contract for the sale and delivery of 20,000 dozen hose, of which 12,000 dozen of the contract price of \$26,400 remain undelivered, made with the Aycock Hosiery Mills of South Pittsburgh, Tennessee; a contract for the sale and delivery of 15,000 dozen hose, of which 10,500 dozen remain undelivered, of the contract price of \$19,925, made with F. Y. Kitzmiller of Reading, Pennsylvania. A claim for the breach of a contract for the purchase and sale of hose, made with the Ellis Hosiery Company of Philadelphia, Pennsylvania, said claim aggregating about the sum of \$1,500; a claim against the Allen Hosiery Company of Philadelphia, Pennsylvania, for the breach of a contract for the non-delivery of about 7,000 dozen of hose, said claim aggregating the sum of about \$18,000. A claim for the damages for the non-delivery of 30,000 dozen hose against A. H. Rumberger of Philadelphia, Pennsylvania, aggregating the sum of \$15,000. A claim for damages for breach of warranty growing out of the purchase and sale of 2,000 dozen hose, aggregating \$2,250, against Thompson Brothers of Milroy, Pennsylvania; a contract for the sale and delivery of 22,000 dozen hose, of which 20,000 dozen remain undelivered, of the contract price of \$37,000, made with the Rockwood Hosiery Mills of Rockwood, Tennessee. A claim for the breach of a contract for the sale and delivery of 20,000 dozen hose, for failure to deliver the same, aggregating \$8,500.

against the Harriman Hosiery Mills, Harriman, Tennessee. A claim against the Colonial Knitting Mills, Inc., of Philadelphia, Pennsylvania, aggregating \$8,500, for failure to deliver 8,500 dozen hose. That all of said contracts for the purchase and sale of hose as aforesaid were made in the name of the said David Costaguta & Company and for the benefit of said copartnership, and as to a number of said contracts and claims, suits have been instituted and are pending to recover damages sustained by said partnership for the breaches of said contracts.

XXIX. That immediately after the time when the said David Costaguta & Company succeeded in making said transfers to said defendant corporation, all of which were made without the consent of your deponent, the said defendant Eugenio Ottolenghi, who, as the resident partner of said David Costaguta & Company in the City of New York, arranged and conducted said transfers and disposed of all of the property of the copartnership in which your deponent was interested, clandestinely removed his residence from the City of New York to a neighboring State and refused to come within the State of New York or within the jurisdiction of this Court, in order to enable your deponent to confer with him regarding the affairs of said copartnership, fearing that by so doing jurisdiction over his person and the partnership of David Costaguta & Company might thereby be acquired, and your deponent was unable to ascertain the place of sojourn of said Ottolenghi until your deponent learned that he had

sailed from New Orleans, Louisiana, for Buenos Aires in the latter part of February, 1920.

XXX. That prior to said Ottolenghi's departure from the jurisdiction of this Court he caused the place of business of the copartnership to be discontinued, the employees thereof discharged, the name to be erased from the premises and that of the American-European Trading Corporation substituted, and notices sent out to all persons with whom said copartnership had been doing business that said copartnership had ceased all business and that inquiries respecting same should be addressed to the defendant the American-European Trading Corporation, which would attend to the details of the completed business of said copartnership.

That simultaneously with the presentation of this affidavit for the issuance of a rule *nisi*, for which no previous application has been made, your deponent has filed in the office of the Clerk of this Court his Bill of Complaint in the above-entitled action, to which your deponent refers and makes a part of this application.

WHEREFORE your deponent respectfully prays that an order be granted herein requiring the defendants and each of them to show cause, at a time and place therein to be stated, why an order should not be made, which shall provide:

1st. That a Receiver *pendente lite* be appointed herein of all of the property, assets and effects, of whatever kind, character, nature or description and

wheresoever situated, of the copartnership composed of the plaintiff and the partnership of David Costaguta & Company, and of all of the property, assets and effects of the partnership of David Costaguta & Company, composed of the said David Costaguta, Marcos Algiers, Alejandro Sassoli and Eugenio Ottolenghi, which are or have been commingled with the assets of said copartnership, and of all of the property, assets and effects of the defendant American-European Trading Corporation, and of the capital stock thereof, and regardless as to whether the said capital stock or any of the property of any of the defendants or of said copartnership is held in the name of said defendants, or in the name of any other person, firm or corporation for them; that said Receiver take, hold and administer the property of and liquidate the affairs of the said copartnership; that said Receiver take and hold, subject to the further order and judgment of this Court, the property, assets and effects of the said David Costaguta & Company and the American-European Trading Corporation, into which the property, assets and effects of the said copartnership shall be traced, and take and hold, subject to the like order and judgment of this Court, such property and effects, held by each and all of the defendants, to answer to any judgment that may be rendered against them in this suit.

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2nd. That the plaintiff and each and all of the defendants herein, their agents, servants and employees, and each and every other person, firm or corporation, having possession, custody or control

*Affidavit of Henry S. De Rees.*

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hereby jointly and severally enjoined and restrained pending the hearing and determination upon the return of a rule *nisi* from in any manner or form whatsoever interfering with, assigning, transferring or disposing of, or removing from the jurisdiction of this Court, any property of any kind, character, nature or description whatsoever and wheresoever situate, belonging to the defendants or either of them, or belonging to the said copartnership.

HENRY S. DE REES.

Sworn to before me this  
10th day of March, 1920.

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ANNA G. McCONNELL,  
Notary Public,  
Bronx Co. No. 1.

\* Certificate filed in New York Co. No. 64.

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**232 Exhibits Annexed to Affidavit of Henry S. De Rees.**

**EXHIBIT "A."**

En la Ciudad de Buenos Aires a primero de Noviembre de mil novecientos diez y siete entre los Senores David Costaguta por una parte, y el Senor Henry S. De Rees por la otre, se ha convenido lo siguiente:

**233** 1.—Los Senores David Costaguta & Cia establecen en su propria Casa una Seccion especial que se denominara "Seccion Medias" para la compra y venta de medias en general y demas articulos de punto o cualquier otro region o que de comun acuerdo se convenga explotar, autorizando al Senor De Rees de dirigir la Seccion.

2.—Los Senores David Costaguta & Cia fijarán los creditos y condiciones de venta para la clientela.

**234** 3.—El Senor De Rees durante la estadis en Buenos Aires deberá someter á la aprobaci6n de los Sres David Costaguta & Cia. las disposiciones de compras, mientras cuando se traslade á Norte America ó Europa para efectuar compras, tendre complete liberated de accion, dentro de las sumas que los Senores David Costaguta & Cia fijarán por escrito.

4.—Los gastos que se cargaran á la Seccion seran los que directamente le correspondan por concepto se sueldos á sus empleados, gastos de viales, corretages, cables, telegrams, correo etc. Mientras que los gastos de alquiler, luz, calefaccion, patentes,



sueldos a empleados de contaduría, peones, etc. correrán por cuenta exclusiva de los Senores David Costaguta & Cia.

5.—Al 31 de Octubre de cada año se practicará, un balance y las quitas que se considerará conveniente practicar tanto en las mercaderías que en los créditos se establecerá de común acuerdo entre los Senores David Costaguta & Cia. y el Sr. De Rees. De las utilidades que resulte, se deducirá el seis por ciento (6%) de interés anual sobre el capital que los Senores David Costaguta & Cia hayan suministrado á la Sección y el resto se distribuirá en la proporción siguiente: El cuarenta y cinco por ciento (55%) a los Sres David Costaguta & Cia y el cuarenta y cinco por ciento (45%) al Señor De Rees—Las pérdidas serán soportadas en la misma proporción—El cálculo de los intereses se hará cada seis meses estableciendo una cuenta corriente con los desembolsos y entradas de fondos, y dado el caso que las ganancias del ejercicio no los cubrieran, se pasará el saldo al ejercicio siguiente.

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6.—El Señor De Rees puede retirar mensualmente hasta la suma de Unmil quinientos pesos c/1 (\$1,500. c/1) que se cargará á su cuenta particular.

7.—El Señor De Rees no podrá retirar las utilidades líquidas que le correspondan si no en un cincuenta por ciento (50%) debiendo dejar el resto en depósito en la Casa de los Senores David Costaguta & Cia gozando un interés anual del seis por ciento (6%).

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8.—El Señor De Rees tiene el deber dedicar toda su actividad al servicio de la Seccion, y se obliga a no participar directaments o indirectamente en cualquier otro negocio comercial ni de interesarse de otro asunto ajeno a las Seccion Se conviene entre las partes que la infraccion de parte del Señor De Rees á lo que se establece en el priodo anterior de derecho á los Sres David Costaguta & Cia á no reconocer á favor del Señor De Rees las utilidades que se produjeran durante el chercicio en al cual se ha verificado la infracción.

9.—Para evitar posibles confusiones se hace constar que la "Seccion Medias" no tiene relación alguna con la producción de medias de la fabrica de los Senores David Costaguta & Cia. Llamada "La Tejedora."

10.—Las partes se reservan el derecho de dar por terminado el presente convenio previo aviso de tres meses por carta certificada—Encontrandose susente el Señor De Rees, los Sres David Costaguta & Cia lo avisarán por cable que dirigirán á la ultima direccion indicada por al Señor De Rees.

11.—Tanto los Senores David Costaguta & Cia cuanto el Sr. De Rees al recibir la denuncia del presente convenio podran pedir la liquidación de las mercaderias existentes en casa, en la aduana, en viaje, o en curso de fabricación, perteneciente á la Seccion, obligandose el Sr. De Rees á prestar su cooperación hasta el memento en que se dé por terminada la liquidacion y los Senores David Costaguta & Cia como unicos duenos del negocio

pagaran al Senor De Rees el haber que le corresponda a los plazos que se establecen en el articulo siguiente.

12.—En caso de terminacion de este convenio y que no se aplique el articulo anterior por lo que se refiere ó una eventual liquidacion de les existencias, so practicará un balance observando, por lo que se refiere a quitas, la forma indicada en el articulo 5o y los Senores David Costaguta & Cia se harán cargo del activo y pasivo, paguendo el haber que resulte á favor del Senor De Rees en cuatro cuotas iguales La primera al contado, y las otras á seis, doce y dieciocho meses de plazo, gazando del interes del 6%.

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13.—En caso de fallecimiento del Senor De Rees los Senores David Costaguta & Cia. liquidaran les existencias-dentro del periodo de un ano, á conter desde la fecha del fallecimiento; practicaran un balance y abonarán á los herederos del Senor De Rees el haber que le corresponda, á los plazos que se indican en el articulo anterior. A los herederos se le pagarán tambien los intereses a razon del 6% anual.

Conformes con lo que se establece en los 13 articulos precedentes firman las partes.—Entre lineas "O Europa" y diecioche "Vale—

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Firmados—DAVID COSTAGUTA & CIA.—H. S. De Rees.

Es copia fiel del original redactado en los papeles sellados del corrtte ano de á un peso No. 1,894,884

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*Exhibits to Affidavit of Henry S. De Rees.*

y 5 (habiendo sido habilitado el primero hasta el valor de cien pesos) que queda en poder de los Senores David Costaguta & Cia.

DAVID COSTAGUTA & CO.

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EXHIBIT "B."

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In the City of Buenos Aires, the first of November, One thousand nine hundred and seventeen, between Messrs. David Costaguta, of the one part, and Mr. Henry S. De Rees, of the other, the following has been agreed:

1. Messrs. David Costaguta & Co. establish in their own House a special section which will be called "Hosiery Section," for the purchase and sale of hosiery in general and other articles of knit goods or any other line of goods, which by common accord it is agreed to exploit, authorizing Mr. De Rees to manage the section.

2. Messrs. David Costaguta & Co. will pass on and fix the credits and conditions of sale for the clientele.

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3. Mr. De Rees, during his stay in Buenos Aires shall submit to the approval of Messrs. David Costaguta & Co. the arrangements of purchases, whereas when he goes to North America or Europe to make purchases he shall have complete liberty of action, within the sums which Messrs. David Costaguta & Co. shall fix in writing.

4. The expenses which shall be charged to the Section shall be those which directly belong to it by virtue of salaries to its employees, travelling expenses, brokerage, cables, telegrams, postage, etc., whereas, the expense of rent, light, heating, licenses, salaries of accounting employees, laborers, etc., shall be for the exclusive account of Messrs. David Costaguta & Co.

5. On October 31st of each year a balance shall be struck, and the deductions which it shall be deemed advisable to make in the merchandise as well as in the credits, shall be determined by common accord between Messrs. David Costaguta & Co. and Mr. De Rees. From the resulting profits, there shall be deducted six per cent. (6%) annual interest on the capital which Messrs. David Costaguta & Co. may have supplied to the Section, and the remainder shall be distributed in the following proportion: fifty-five per cent. (55%) to Messrs. David Costaguta & Co. and forty-five per cent. (45%) to Mr. De Rees. The losses shall be borne in the same proportion. The calculation of interest shall be made every six months, an account current being established with the disbursements and receipts of funds, and in case the earnings of the fiscal period do not cover the interest, the balance shall be passed to the following period.

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6. Mr. De Rees may withdraw monthly up to the sum of One thousand Five hundred pesos C/1 (\$1500-C/1) which shall be charged to his personal account.

*Exhibits to Affidavit of Henry S. De Rees.*

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7. Mr. De Rees may withdraw his share of the profits only to the amount of fifty per cent., being under the obligation to leave the balance thereof on deposit with Messrs. David Costaguta & Co., drawing an annual interest of six per cent. (6%).

8. It shall be the duty of Mr. De Rees to devote all his activity to the service of the Section, and he obligates himself not to participate directly or indirectly in any other commercial business, nor to be interested in any other manner foreign to the Section. It is agreed between the parties that the violation by Mr. De Rees of what is provided in the preceding sentence shall entitle Messrs. David Costaguta & Co. to not recognize in favor of Mr. De Rees the profits which are earned during the fiscal period in which the violation has taken place.

9. To avoid possible confusion it is understood that the "Hosiery Section" has no relation whatever with the manufacturing of hosiery of the factory of Messrs. David Costaguta & Co. known as "La Tejedora."

10. The parties reserve the right to terminate the present agreement by giving notice of three months by registered letter. In case Mr. De Rees is absent, Messrs. David Costaguta & Co. will advise him by cable, which they shall address to the last address indicated by Mr. De Rees.

11. Both Messrs. David Costaguta & Co. and Mr. De Rees on receiving the notice of termination of the present contract may request the liquidation of

the merchandise existing in the house, in the Custom-House, in transit, or in course of manufacture, pertaining to this Section, Mr. De Rees obligating himself to give his co-operation up to the moment the liquidation be terminated, and Messrs. David Costaguta & Co. as sole owners of the business shall pay to Mr. De Rees the amount corresponding to him in installments which are established in the following article.

12. In case this agreement is terminated and the preceding article is not applied in so far as it refers to an eventual liquidation of the stock in hand a balance shall be made, observing with regard to deductions the form indicated in Article 5, and Messrs. David Costaguta & Co. shall take charge of the assets and liabilities, paying the amount which results in favor of Mr. De Rees in four equal installments, the first in cash, and the others in installments of six, twelve and eighteen months, with interest at 6%.

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13. In case of the death of Mr. Rees, Messrs. David Costaguta & Co. will liquidate the stock in hand within the period of one year from the date of death; they will make a balance and pay the heirs of Mr. De Rees the amount which belongs to him, in the installments which are indicated in the preceding article. Interest at the rate of 6% annually will be paid also to the heirs.

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Agreeing with what is provided in the preceding 13 articles the parties sign,—the interlined words “or Europe” and “eighteen” being valid,—Signed: David Costaguta & Co. and H. S. De Rees.

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*Exhibits to Affidavit of Henry S. De Rees.*

This is a true copy of the original written on stamped paper of the current year of one peso of No. 1,894,884 and 5 (the tax on the original having been paid up to the value of one hundred pesos) which remains in the possession of David Costaguta & Co.

(Signed) DAVID COSTAGUTA & CO.

## EXHIBIT "C."

DAVID COSTAGUTA & CIA.

Buenos Aires

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Montevideo—Asunción—Valparaiso

New York—Paris

Milan

Buenos Aires, Novembre 1st de 1917.

Suipacha 68-76

Señor

May Señor nuestro

Communicamos á Vd. que por terminación de contrato ha quedado disuelta la sociedad que giraba bajo el rubro de

DAVID COSTAGUTA & CIA.

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haciendose cargo del activo y pasivo de la misma la neuva firma segun circular a la vuelta.

Saludamos á Vd.' muyalte.

S. S. S.

DAVID COSTAGUTA & CIA.



## EXHIBIT "C."

DAVID COSTAGUTA &amp; CIA.

Buenos Aires

Montevideo—Asunción—Valparaiso

New York—Paris

Milan

Buenos Aires, Novembre 1st de 1917.

Señor

Muy Señor nuestro.

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Refiriendonos á la circular que antecede, tenemos el agrado de participar á Vd. que segun escritura firmada ante el escribano Don Alberto L. Pombo, hemos constituido una nueva sociedad que girará bajo el rubro de

DAVID COSTAGUTA &amp; CIA.

de la cual forman parte los Señores David Costaguta, Marcos A. Algier, Alejandro Sassoli y Eugenio Ottolenghi, teniendo los cuatro el carácter de socios activos y solidarios é indistintamente el uso de la firma social.

Al mismo tiempo nos es grato comunicar a Vd. que quedan ratificados los poderes generales otorgados a los Señores Orestes Riccio y Carlos F. Frayser y los poderes colectivos que la firma antecesora habia otorgado á sus antiguos colaboradores Señores José Gristelli, Armando Belleno, Tancredo C. Verardo y Hector Desylla, debiendo los tres últimos firmar indistintamente en unión del primero.

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*Exhibits to Affidavit of Henry S. De Rees.*

Esperando se sirva, dispensar á la nueva sociedad la misma confianza con que ha sido favorecida la anterior, rogámosle tomar nota de las firmas el pié y saludamos á Vd. con la mayor consideración,

Ss. Ss. Ss.

DAVID COSTAGUTA &amp; CIA.

## EXHIBIT "D."

DAVID COSTAGUTA &amp; CIA.

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Buenos Aires

Montevideo—Asunción—Valparaiso

New York—Paris

Milan

Buenos Aires, November 1, 1917.

Dear Sirs:—

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We herewith communicate to you that owing to termination of the contract, the partnership which has been doing business under the name of David Costaguta & Company is dissolved, and that the new partnership as indicated in the annexed circular on the reverse side of this, has assumed and taken charge of all of the assets and liabilities of the dissolved partnership.

Yours very truly,

S. S. S.

DAVID COSTAGUTA &amp; CO.

## EXHIBIT "D."

DAVID COSTAGUTA & CIA.  
Buenos Aires

Montevideo—Asunción—Valparaiso  
New York—Paris  
Milan

Buenos Aires, November 1st, 1917.

Dear Sirs:—

Referring to the foregoing circular, we take the pleasure of advising you that according to the agreement signed before the Notary Mr. Alberto L. Pombo, we have formed a new copartnership which will do business under the name of DAVID COSTAGUTA & COMPANY and which is composed of Messrs. David Costaguta, Marcos A. Algier, Alejandro Sassoli and Eugenio Ottolenghi, all of whom are full and active partners and indistinctively have the right to use the partnership signature.

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At the same time we take pleasure in advising you of the ratification of the general Powers of Attorney given to Orestes Riccio and Carlos F. Frayser and the collective Powers of attorney which the former firm had given to its old employees Jose Gristelli, Armando Belleno, Tancredo C. Verardo and Hector Desylla, the three last named shall sign separately in union with the former.

267

Hoping you will give to the new copartnership the same confidence you did to the former and asking you to take notice of the signatures at the foot hereof, we remain, with most consideration,

DAVID COSTAGUTA & COMPANY.

## EXHIBIT "E."

Enero 31 de 19.  
 Senor H. S. De Rees,  
 Nueva York.

Muy Señor nuestro:

Noe complacemos en remitirle adjunto:

1. Extracto de su cuenta corriente, en nuestra casa, cerrado al 31 de Octubre 1918, con un saldo á su favor de:

m\$ n 1.526.90

269

2. Extracto de su "Cuenta deposito obligado," en nuestra casa, cerrado al 31 de Octubre 1918, con un saldo de:

m\$ n 54.735.79

3. Detalle del balance de la Seccion "Medias N. A." al 31 de Octubre 1918. El inventario á esa misma fecha, ya lo hemos remitido á nuestra casa de Nueva York en fecha 7 de Diciembre ppdo. (nuestra carta fol. 375) y con nuestros cables á la misma, de fecha 2 y 15 de Noviembre ppdos. ne habiamos anticipado de darle la existencia aproximada (Doll. 700.000.-) y el detalle de lo disponible, tipo por tipo.

270

Por lo que se refiere al extracto de su cuenta corriente, observamosle que hemos llevado á su credito, con caracter provisional, la suma de Doll.9.125.—á que se refiere el telegrama que hemos recibido de n/ casa en esa, con fecha 25 de Noviembre ppdo. Esperamos, como nos ha escrito la mencionada casa en fecha 25 de Octubre ppdo., que pronto recibiremos el detalle de esa suma para revisarla.

Sin otro motive, saludamosle cordialmente.

## EXHIBIT "E."

Señor H. S. DE REES

CURETA DEPOSITO OBLIGADO EN LA CASA DAVID COS-  
TAGUTA & CIA. BS. AIRES al 31/10/1918.

	Debe	Haber
	m\$n.	c/1.
1918		
Octubre 31 Traspaso de Cuenta		
Corriente de la mitad de su par-		
ticipación á los beneficios		
del Ejercicio 1917/1918, de		
acuerdo con el contrato		

Valor 31 Octubre 1918

272

54.735.79

S. E. ú.

Bs. Aires, Octubre 31 de 1918.

## EXHIBIT "F."

January 31, 1919.

Mr. H. S. De Rees,

New York.

Dear Sir:—

With pleasure we remit attached:

First, extract of your account current in our  
house closed on October 31st, 1918, with a balance  
in your favor of 1,526.90 Argentine pesos m/n.

273

Second, extract of your obligatory deposit account  
in our house closed on December 31st, 1918, with  
a balance of 54,735.79 Argentine pesos m/n.

Third, Details of the balance of the N. A. Hosiery  
Section on October 31st, 1918. The inventory on

274

*Exhibits to Affidavit of Henry S. De Rees.*

this same date we have already sent to our New York house under date of December 7th (our letter fol. 375) and with our cables to the same dated 2nd and 15th of November, we had given you the approximate stock on hand \$700,000 and the details of the styles on hand, style per style.

As regards your account current take notice that we have credited you provisionally the sum of \$9,125 which is referred to in the telegram which we received from our house there dated November 25th. We hope as the above mentioned house wrote to us under date of October 25th, that we will soon receive the details of this amount to revise it.

With nothing more for the present, we remain—

## EXHIBIT "F."

Mr. H. S. De Rees,

OBLIGATORY DEPOSIT ACCOUNT IN THE HOUSE OF DAVID  
COSTAGUTA & COMPANY, BUENOS AIRES, TO OCTOBER 31ST, 1918.

1918

Debit      Credit  
Argentine Pesos.  
m/n.c/l.

276

October 31st, Transferred from  
current account one-half of  
your participation in the  
profits of the fiscal year 1917-  
1918, according to contract  
value October 31, 1918.....  
Buenos Aires, October 31st, 1918.  
Subject to errors or omissions.

54.735.79

*Exhibits to Affidavit of He*

## EXHIBIT "G."

DEBE

## CUENTA SECCION MEDIAS EJ

	m\$n	
Existencia de mercaderias al 1/11/1917	302,333.18	Ven
Derechos de aduana pagados durante el ejercicio	182,201.61	Ven
Caja: varios pases por mercaderias	724,423.37	Pro
American Express Company: pases efectuados por cuenta de la Seccion	301,512.10	
Casa New York: Facturas	1,082,910.35	
Comisiones a los corredores y a los represen- tantes	32,886.09	BAI
Gastos del ejercicio Buenos Aires y New York	57,840.24	
Peridas sobre creditos	3,693.75	
Intereses por el capital adelantado a la Seccion durante el ejercicio	39,745.59	
Reserva a/los creditos de la Seccion al 31/10/ 1918	4,050.95	
<b>GANANCIA LIQUIDA:</b> repartida como sigue:		
55% a David Costaguta & Cia.	m\$n. 133,798.59	
45% a H. S. De Rees	" 109,471.53	
	<u>243,270.17</u>	
	<u>2,974,866.40</u>	

1918  
Noviembre 1

## BALANCE DE ENTRADA:

Existencia mercaderias  
S. E. u O.

m\$n. 1,321,993.26

Buenos Aires, 31 de Octubre de 1918.

*Exhibits to Affidavit of Henry S. De Rees.*

## EXHIBIT "G."

## CUENTA SECCION MEDIAS EJERCICIO 1917/1918.

HABER

	m\$n
Existencia de mercaderias al 1/11/1917	302,333.18
Derechos de aduana pagados durante el ejercicio	182,201.61
Caja: varios pases por mercaderias	724,423.37
American Express Company: pases efectuados por cuenta de la Seccion	301,512.10
Casa New York: Facturas	1,082,910.35
Comisiones a los corredores y a los representantes	32,886.09
Gastos del ejercicio Buenos Aires y New York	57,840.24
Perdidas sobre creditos	3,693.75
Intereses por el capital adelantado a la Seccion durante el ejercicio	39,745.59
Reserva a/los creditos de la Seccion al 31/10/1918	4,050.95

## GANANCIA LIQUIDA:

repartida como sigue:

55% a David Costaguta & Cia.	m\$n. 133,798.59	
45% a H. S. De Rees	" 109,471.58	243,270.17
		<u>2,974,866.40</u>

Ventas neto durante el ejercicio 1917/18	m\$n. 1,584,097.79
Ventas al contado	" 42,104.25
Producto de las Ventas en Chile, Peru y New York, varias diferencias sobre facturas y fletes, y reembolsos faltas	" 26,671.10
	<u>1,652,873.14</u>

## BALANCE DE SALIDA:

Existencia de mercaderias

1,652,873.14

1,321,993.26

2,974,866.40

## BALANCE DE ENTRADA:

Existencia mercaderias	m\$n. 1,321,993.26
S. E. u O.	

Buenos Aires, 31 de Octubre de 1918.

1918

viembre 1



Senor H. S. DE REES (SU CUENTA CORRIENTE con DAVID COSTAGUTA & CIA.--BUENOS AIRES.

		HABER				SU CUENTA CERRADA AL 31 OCTUBRE 1918.				DEBE			
		Valor	Dias	Numeros	Importes m\$.c/1			Valor	Dias	Numeros	Importes m\$.c/1		
1917													
Noviembre 1	Importe fact. R. H. Macy & C. (2 Cocinitas electricas) mas fletes, intereses y comision Banco Doll. 53.63 a 97.50 y 44	Octubre 31	365	434	118.85	1917	a la vuelta			114.077	31.253.99		
						Noviem. 1	Saldo a su favor, segun cuenta en su poder	Octubre 31	365	114.077	31.253.99		
" 20	Nota gastos despacho v/ Russ (2 Cocinitas electricas)	Noviemb. 20	345	72	21.50								
" 5	Alquiler de Octubre	" 5	360	720	200.—								
" 13	N/ entrega	" 13	352	3.520	1.000.—								
" 27	Subscripcion pro Italia	" 27	338	169	50.—								
" "	Abono Union Telefonica	" "	338	101	30.—								
" 28	N/ entrega	" 28	337	3.370	1.000.—								
Diciembre 1	N/ deposito al City Bank	Diciembre 1	334	1.670	500.—								
" 1	N/ giro a la vista a/ New York, Doll. 2.000. a 94.40 y 44	" "	334	14.332	4.290.90								
" 3	Flete equipaje a Chile	" 3	332	258	77.80								
" "	Telegrama a Chile	" "	"	"	.50								
" "	Pasaje a Valparaiso	" "	332		200.95								
" "	N/ entrega: £100.—, —, a 12.10 y \$150. a 2.24	" "	"	5.783	1.546.—								
" 18	Alquiler de Noviembre	" 18	317	634	200.—								
1918		1918											
Enero 3	N/ giro teleg. s/ N. York por intermedio American Express Company \$25.000 a 93.60 y 44	Enero 3	301	160.078	53.181.80								
" 8	Alquiler de Diciembre	" 8	296	592	200.—								
" 12	N/ deposito al City Bank	" 12	292	1.420	500.—								

## Exhibits to Affidavit of Henry S. De Rees.

1918		de la vuelta	1918		193.193	m\$n.c/1 63.118.30	1918		de la vuelta	1918		114.077	m\$n.c/1 31.253.99
Febrero	1	N/ deposito al City Bank	Febrero	1	272	1.360	500.—	Abril 27	Su factura por muestras remitidas por Encomienda Doll. 27.47 a 100 y 44	Abril 27	187	116	62.43
"	8	Alquiler Enero	"	8	265	530	200.—						
"	28	Fact. 26/7/17 The General Fire Cy. 2 gomas entregadasle \$23.91 a 99.70 y 44	1917 Octubre	31	365	197	54.20						
Marzo	1	N/ deposito al City Bank	1918 Marzo	1	244	1.220	500.—						
"	16	Alquiler Febrero	"	16	229	458	200.—						
Abril	1	N/ deposito al City Bank	Abril	1	213	1.065	500.—						
"	18	Alquiler Marzo	"	18	196	392	200.—						
Mayo	1	N/ deposito al City Bank	Mayo	1	183	915	500.—						
"	14	Alquiler Abril	"	14	170	340	200.—						
Junio	1	N/ deposito al City Bank	Junio	1	152	760	500.—						
"	11	Alquiler Mayo	"	11	142	284	200.—						
Julio	1	N/ deposito al City Bank	Julio	1	122	610	500.—						
"	11	Alquiler Junio	"	11	112	224	200.—						
"	13	Error en s/fact. 25/4/18 (carta 13/7/18 a Casa NY. fo. 141) \$87.22 a 100 y 44	Abril	30	184	364	198.22						
"	25	Difer. en s/fact. 25/4/18 (carta 25/7/18 a Casa NY. fo. 170/1) \$164.20 a 100 y 44	"	30	184	686	373.18						
Agosto	5	N/ deposito al City Bank	Agosto	5	87	435	500.—						
"	9	Alquiler de Julio	"	9	83	207	250.—						
Setiem.	5	N/ deposito al City Bank	Setiemb.	5	56	280	500.—						
"	11	Alquiler Agosto	"	11	50	125	250.—						
"	19	Billete Rifa Italiana	"	19	42	42	100.—						
"	23	Pasaje a N. Y. de su Sra.	"	23	38	224	588.85						
"	28	N/ deposito al City Bank	"	28	33	165	500.—						
		a la vuelta			204.076	70.632.75			a la vuelta			114.193	31.316.43

## Exhibits to Affidavit of Henry S. De Rees.

n.c/1	1918	de la vuelta	1918	m\$n.c/1	1918	de la vuelta	1918	m\$n.c/1
353.99				204.076	70.632.75		114.193	31.316.42
62.43	30	Sellos p. contrato sublocacion su de- parto.	Setiembre 30	31	2	7.60		
	9	Alquiler Setiembre	Octubre 9	22	55	250.—		
	25	Telegr. a N. Y. de Setiemb.	" 25	6	..	3.61		
	31	Beneficios en ventas al Chile, segun liquid. 5/10/18 de Casa N.Y.\$7.790.78 a 100 y 44	" 31	..	..	17.706.31		
	"	Beneficios en ventas a Fernandez Hnos. Lima, Segun liquid. de Casa N. Y. 5/10/18 \$577.99 a 100 y 44	" "	..	..	1.313.60		
	"	Intereses 6% s/ balance numeros (89.916)				1.498.60		
	"	Traspaso a su cuenta deposito obligado de acuerdo con el contrato (mitad de su participacion a los beneficios del ejercicio)				54.735.79		
	"	Balance Capitales: SALDO ACREE-DOR				15.552.47		
				204.133	161.700.73		204.133	161.700.73
	1918						Valor	m\$n.c/1
	Noviem.	1 Saldo a su favor menos:					Octubre 31	15.552.47
		Beneficios en ventas en N. York, segun liquidacion 5/10/18 de n/Casa N. Y. \$6.171.25 a 100/44					" "	14.025.57
		Saldo definitivo a s/ fav.						1.526.90
		Bs. Aires, Noviembre 1° de 1918. S. E. & O.						

*Exhibits to Affidavit of Henry S. De Rees.*

## EXHIBIT "J."

Mr. H. S. DE REES YOUR ACCOUNT CURRENT with DAVID COSTAGUTA &amp; COMPANY, BUENOS AIRES.

DEBIT						YOUR ACCOUNT CLOSED ON OCTOBER 31, 1918.						CREDIT																							
						As of	Days	Numbers	Amounts							As of	Days	Numbers	Amounts																
										Argentine Pesos											Argentine Pesos														
1917						1917				1917				1917				1917																	
Nov. 1	Amount of bills R. H. Macy & Co. two Electric stoves with freight, interest and bank commissions \$53.63 at 97.50 and 44									m/n.c/1	Brought forward								114,077	31,253.30															
										Nov. 1				Balance in your favor as per account in your hands																					
						Oct. 31	365	434	118.85											Oct. 31	365	114,077	31,253.30												
Nov. 20	Note expenses dispatching two electric stoves					Nov. 20	345	72	21.50																										
" 5	Rent for Oct.					" 5	360	720	200.00																										
" 13	Cash paid					" 13	352	3,520	1,000.00																										
" 27	Subscription to Italy					" 27	338	169	50.00																										
" "	Union Telephone					" 27	338	101	30.00																										
" 28	Cash paid					" 28	337	3,370	1,000.00																										
Dec. 1	Deposited City Bank					Dec. 1	334	1,670	500.00																										
" "	Sight draft New York \$2,000 at 94.40 and 44					" "	334	14,332	4,290.90																										
" 3	Baggage to Chile					" 3	332	258	77.80																										
" 3	Telegram to Chile					" "	"		.50																										
" "	Passage to Valparaiso					" "	332		200.95																										
" "	Paid 100¢ at 12.10 and 150 at 2.24					" "	"	5,783	1,546.00																										
" 18	Rent for November					" 18	317	634	200.00																										
1918						1918																													
Jan. 3	Telegraphic draft on New York through American Express Co. \$25,000 at 93.60 and 44					Jan. 3	301	160,078	53,181.80																										
" 8	Rent for December					" 8	296	592	200.00																										
" 12	Deposit in City Bank					" 12	292	1,460	500.00																										
Carried forward						193,193						63,118.30						Carried forward						114,077						31,253.30					

*Exhibits to Affidavit of Henry S. De Rees.*

1918		1918	Argentine Pesos		1918		1918	Argentine Pesos	
			193,193	63,118.30				144,077	31,253.99
	Brought forward					Brought forward			
Feb. 1	Deposited in City Bank	Feb. 1	272	1,360	500.00	Apr. 27	Your bill for samples sent by parcel post \$27.47, at 100 and 44		
" 8	Rent January	" 8	265	530	200.00				
" 28	Bill July 26, 17 General Tire Co. 2 tires \$23.91 at 99.70 and 44	1917 Oct. 31	365	197	54.20	Apr. 27	187	116	62.43
		1918							
Mar. 1	Deposited City Bank	Mar. 1	244	1,220	500.00				
" 16	Rent February	" 16	229	458	200.00				
Apr. 1	Deposited City Bank	Apr. 1	213	1,065	500.00				
" 18	Rent March	" 18	196	392	200.00				
May 1	Deposited City Bank	May 1	183	915	500.00				
" 14	Rent April	" 14	170	340	200.00				
June 1	Deposited City Bank	June 1	152	760	500.00				
" 11	Rent May	" 11	142	284	200.00				
July 1	Deposited City Bank	July 1	122	610	500.00				
" 11	Rent June	" 11	112	224	200.00				
" 13	Error in bill Apr. 25, 18 letter July 13, 18 to N. Y. House fo. 141 \$87.22 at 100 and 44	Apr. 30	184	364	198.22				
" 25	Difference in bill Apr. 25/18 letter July 25/18 to N. Y. House fo. 170/1 \$164.20 at 100 and 44	" 30	184	686	373.18				
Aug. 5	Deposited City Bank	Aug. 5	87	435	5 00				
" 9	Rent July	" 9	83	207	250.00				
Sept. 5	Deposited City Bank	Sept. 5	56	280	500.00				
" 11	Rent August	" 11	50	125	250.00				
" 19	Ticket Italian Rifle	" 19	42	42	100.00				
" 23	Passage to New York of your wife	" 23	38	224	588.85				
" 28	Deposited City Bank	" 28	33	165	500.00				
	Carried forward		204,076	70,632.75		Carried forward		114,193	31,316.42

*Exhibits to Affidavit of Henry S. De Rees.*

1918		1918	Argentine Pesos		1918		1918	Argentine Pesos			
	Brought forward		204,076	70,632.75		Brought forward		114,193	31,316.42		
Sept. 30	Stamps bought changing location department	Sept. 30	31	2	7.60	Oct. 17	Payment from Percy Walter Tinan, rent dept. Cordoba, 612, for the 19 days of October at \$275 per month	Oct. 17	14	24	174.10
Oct. 9	Rent September	" 9	22	55	250.00						
" 25	Telegraph New York Sept.	Oct. 25	6	..	3.61	" 31	Your expenses to Oct.31/18 credited provisionally reserving the revision on arrival of details, \$9,125.00 at 100 & 44	" 31			20,738.63
" 31	Benefits of Sales Chile as liquidation Oct. 5, 1918 of N. Y. House \$7,790.78 at 100 and 44	" 31	..	..	17,706.31	" "	Your share in the profits of the hosiery section	" 31			109,471.58
" "	Benefits in sales to Fernandez Hnos. Lima, as liquidation N.Y.House Oct. 5/18 \$577.99 at 100 and 44	" "	..	..	1,313.60		Balance numbers			89,916	
" "	Interest 6% on balance numbers (89,916)				1,498.60						
" "	Transferred to your obligatory deposit account according to contract, half of your part on profits for fiscal year				54,735.79						
" "	Capital Balance:										
	BALANCE CREDITED				15,552.47						
			204,133	161,700.73					204,133	161,700.73	
						1918			As of		
						Nov. 1	Balance in your favor	Oct. 31	15,552.47		
							Less:				
							Profits in New York on sales as per liquidation Oct. 5/18 of our N. Y. house, \$6,171.25 at 100 & 44	" "	14,025.57		
							Definite balance your favor			1,526.90	
						Buenos Aires, Nov. 1, 1918.					
						Subject to errors and omissions.					

## EXHIBIT "K."

Copy.

November 10, 1919.

David Costaguta & Co.,  
New York and Buenos Aires.

Dear Sirs:

Referring to my letter of August 22nd, 1919, wherein I gave the necessary ninety (90) days' notice of cancellation of contract as per paragraph 10, reserving the right to later state whether I should elect a special balance or liquidation.

302

You will kindly accept this as notice that I have chosen to elect a complete liquidation and am ready to assist with same as per conditions of the contract but with the distinct understanding that on and after November 22nd, 1919, I shall be at liberty to, without infraction of the contract whatsoever, become interested in any other business I see fit. If there is anything to the contrary, I shall expect written notice to the same previous to November 22nd, otherwise it will be understood as above stated.

Please understand in giving notice of the cancellation of the contract, that I leave my very best wishes with the house for its future and will do everything possible towards the complete liquidation of the same, and where I consider any purchases are necessary to assist in the more advantageous liquidation of any and all stock, I shall

303

304

*Exhibits to Affidavit of Henry S. De Rees.*

make said purchases, which will be included in the liquidation.

If for any reason you have any suggestion that you would like to offer, which could make a quicker settlement than the liquidation, I shall be pleased to entertain it.

Yours very truly.

HSD/AG

305

## EXHIBIT "L."

Copy.

New York, 14/11/19

Henry S. De Rees, Esq.,  
22 White Street,  
New York.

Dear Sir:

306

Your letter of the 10th received. We note that you want a liquidation and are glad to note that you are ready to assist in effecting the same. Please permit us to say that we intend to do everything to expedite the liquidation to the end that it may be completed by or as soon after November 22, 1919, as is possible under the circumstances.

We would like if possible to have the liquidation made in such a manner as would be entirely satisfactory to you and accordingly would welcome



any suggestions you care to make as to the manner of making the liquidation.

You have asked whether we agree with your interpretation that on and after November 22, 1919, you may if you see fit engage in any other business either for yourself or for somebody else, we desire to say that our counsel in New York has advised us that in his opinion your interpretation of the contract in this respect is correct, with the qualification however which we think you will accept namely, that on and after November 22, you are obligated to give such time as may be required at Buenos Aires as well as at New York, to promptly complete the liquidation and if necessarily required to give all your time to the exclusion of all other business. In connection with the engagement by you in business either for yourself or for other after the termination of the contract, we wish to say that in our opinion fair dealing requires that before you engage in the hosiery business, the liquidation should be completed, unless of course the liquidation should be necessarily and unjustly delayed or prolonged on our part.

308

In respect to the statement made by you that if you consider it necessary in connection with the liquidation you will purchase hosiery, we desire to state that we do not give you any authority to make such purchases and will refuse to be bound by the same unless of course at some later date we give our consent to the same upon previously being advised of the exigencies which require such purchases to be made, in which event we will give our written consent to you for making such purchases.

309

**310**      *Exhibits to Affidavit of Henry S. De Rees.*

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In conclusion we wish to have it understood that nothing herein stated shall be construed as in any way altering or modifying or waiving any of the terms of the contract, and that any reply made by you to this letter shall be considered sent upon the same understanding.

Very truly yours,

DAVID COSTAGUTA & CO.

---

**311**      The foregoing Rule Nisi, affidavit and exhibits thereon are marked filed United States District Court, Southern District of New York, March 10, 1920.

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Endorsed upon the foregoing affidavits and rule nisi is the following:

Motion adjourned to March 29, 1920, at 10.30 A. M.

The injunction now in force will be raised to the extent of allowing the American-European Trading Corporation to use the funds attached for the sole purpose of carrying on its business.

**312**

Mar. 19/20.

LEARNED HAND,  
U. S. D. J.

*Exhibits to Affidavit of Henry S. De Rees.*

313

I HEREBY CERTIFY that on the 10th day of March, 1920, at the City of New York, in my district, I personally served the within order to show cause and affs. upon the within named defendant Renado Taffell by exhibiting to him at #22 White St., N. Y. City, the within originals, and at the same time leaving with him a certified copy of order to show cause and copies of affs. and bill of complaint in this suit.

THOMAS D. MCCARTHY,

United States Marshal,

Southern District of New York. 314

Dated, March 11, 1920.

I HEREBY CERTIFY that on the 10th day of March, 1920, the City of New York, in my district, I served the within order to show cause and affs. upon the within named defendant David Costaguta and Company by exhibiting to Leon Grumet, as agent and atty. in fact, at #22 White St., N. Y. City, the within originals, and at the same time leaving with him a certified copy of order to show cause and copies of affs. and bill of complaint in this suit.

315

THOMAS D. MCCARTHY,

United States Marshal,

Southern District of New York.

Dated, March 11, 1920.

316

*Exhibits to Affidavit of Henry S. De Rees.*

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I HEREBY CERTIFY that on the 10th day of March, 1920, at the City of New York, in my district, I served the within order to show cause and affs. upon the within named defendant, the American-European Trading Corporation, by exhibiting to Leon Grumet, as President of said Corp., at #22 White St., N. Y. City, the within originals, and at the same time leaving with him a certified copy of order to show cause & copies of affs. and bill of complaint in this suit.

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THOMAS D. McCARTHY,  
United States Marshal,  
Southern District of New York.

Dated, March 11, 1920.

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The foregoing returns of the Marshal are attached to the rule nisi.

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**Affidavit of Frederick M. Czaki on Ap- 319**  
**plication for Order of Substituted**  
**Service.**

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

HENRY S. DE REES,  
 Plaintiff,

against

DAVID COSTAGUTA and others,  
 Defendants.

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STATE OF NEW YORK,  
 COUNTY OF NEW YORK, } ss.:  
 SOUTHERN DISTRICT OF NEW YORK,

FREDERICK M. CZAKI, being duly sworn, deposes  
 and says:

FIRST: That he is a member of the firm of Erwin,  
 Fried and Czaki, who are the solicitors for the plain-  
 tiff in the above-entitled action, with offices at No. 321  
 15 William Street, in the City of New York, Bor-  
 ough of Manhattan.

SECOND: That heretofore and on the 10th day  
 of March, 1920, the above-named plaintiff duly in-  
 stituted the above-entitled action for the purpose of

dissolving the copartnership existing between himself on the one hand and the partnership of David Costaguta & Company on the other, composed of the defendants David Costaguta, Marcos A. Algiers, Alejandro Sassoli and Eugenio Ottolenghi, and for an accounting and liquidation of the property and effects of said copartnership.

THIRD: That on said 10th day of March, 1920, the Subpoena and Bill of Complaint herein were duly served by the United States Marshal upon the defendants Renado Taffell and the American-European Trading Corporation and upon Leon Grumet, as agent and attorney in fact of the said partnership of David Costaguta & Company, composed of the said defendants David Costaguta, Marcos A. Algiers, Alejandro Sassoli and Eugenio Ottolenghi, as appears more particularly by the return of the United States Marshal filed in the office of the Clerk of this Court on the 11th day of March, 1920. That the above-entitled action is brought to enforce an equitable lien or claim to and upon the title to personal property within this District, and the said defendants American-European Trading Corporation, Renado Taffell and the said Leon Grumet were and are in possession of the property of the said copartnership in which the said plaintiff, as a partner, is interested.

FOURTH: That on the 12th day of March, 1920, the United States Marshal duly made his return, filed in the office of the Clerk of this Court, on the 12th day of March, 1920; that after due and dili-

gent search he was unable to find the defendants David Costaguta, Marcos A. Algiers, Alejandro Sassoli and Eugenio Ottolenghi in the Southern District of New York.

FIFTH: That as appears more particularly by the averments of the Bill of Complaint and the affidavit of the plaintiff, duly verified the 10th day of March, 1920, both duly filed in the office of the Clerk of this Court, the defendants David Costaguta and Alejandro Sassoli were and now are citizens and subjects of the Kingdom of Italy and residents of the City of Buenos Aires in the Republic of Argentine. That the defendant Eugenio Ottolenghi was and now is a citizen of the Republic of Argentine, and a resident of the City of Buenos Aires, Argentine Republic, and that the defendant Marcos A. Algiers was and now is a citizen of the Republic of France and a resident of the City of Buenos Aires, Argentine Republic, and that the said David Costaguta, Marcos A. Algiers, Alejandro Sassoli and Eugenio Ottolenghi are not now inhabitants and cannot be found within this District.

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SIXTH: That as your deponent is informed and verily believes, all of the said defendants, David Costaguta, Marcos A. Algiers, Alejandro Sassoli and Eugenio Ottolenghi, actually reside in the City of Buenos Aires, in the Republic of Argentine, but that deponent has no knowledge or information as to the street and number in said City at which any of the said mentioned defendants reside, but that said defendants compose the firm of David Cos-

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taguta & Company and are engaged in business in said City of Buenos Aires, Argentine Republic, and have an office and place for the transaction of their business at No. 1382 Calle Alsina in said City.

SEVENTH: That your deponent is further informed and verily believes that one Leon Grumet is the agent and attorney in fact of the said defendants composing the partnership of David Costaguta & Company and that said Leon Grumet is now in the Southern District of New York and engaged in business on behalf of the said defendants David Costaguta & Company at No. 22 White Street, in the City of New York, Borough of Manhattan.

WHEREFORE your deponent respectfully prays this Honorable Court that an order be made and entered herein directing that the said David Costaguta, Marcos A. Algiers, Alejandro Sassoli and Eugenio Ottolenghi appear, plead, answer or demur to said Bill of Complaint by a day certain to be designated in said order, which order shall be served upon each absent defendants, to wit, David Costaguta, Marcos A. Algiers, Alejandro Sassoli and Eugenio Ottolenghi, as follows:

1st. By delivering and leaving a copy of said order, together with a copy of said Bill of Complaint and Subpoena, with the said Leon Grumet personally.

2nd. By mailing a copy of said order, together with a copy of said Subpoena and Bill of Com-



*Affidavit of Frederick M. Czaki.*

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plaint, addressed to David Costaguta & Company, at No. 1382 Calle Alsina, in the City of Buenos Aires, Argentine Republic.

3rd. By publishing a copy of the said order, together with said subpoena, in the Evening Post, a daily newspaper published in the City and County of New York once a week for six successive weeks.

FREDERICK M. CZAKI.

Sworn to before me this  
15th day of March, 1920.

332

ANNA G. McCONNELL,  
Notary Public,  
Bronx Co. #1.  
Cert. filed in New York Co. #64.

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**Order for Substituted Service.**

At a Stated Term of the District Court of the United States, held in and for the Southern District of New York, in the Post Office Building, in the City of New York, Borough of Manhattan, on the 16th day of March, 1920.

Present:

HON. LEARNED HAND,  
*District Judge.*

335

HENRY S. DE REES,  
Plaintiff,  
against

DAVID COSTAGUTA, MARCOS A. ALGIERS, ALEJANDRO SASSOLI, EUGENIO OTTOLENGHI, individually and as copartners in business, composing the copartnership of David Costaguta & Company, Renado Taffell and the American-European Trading Corporation,  
Defendants.

± E-17-201.

336

UPON the Bill of Complaint herein, duly filed in the office of the Clerk of this Court on the 10th day of March, 1920, the Return of the Marshal that the defendants David Costaguta, Marcos A. Algiers, Alejandro Sassoli and Eugenio Ottolenghi cannot, after due and diligent search, be found in this Dis-

*Order for Substituted Service.*

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trict, and the annexed affidavit of Frederick M. Czaki, verified the 15th day of March, 1920, from which it appears that the above-entitled action is brought to enforce an equitable lien upon or claim to the title to personal property within this District, and that the defendants David Costaguta, Marcos A. Algiers, Alejandro Sassoli and Eugenio Ottolenghi, and each of them, are not now inhabitants of and cannot be found within the Southern District of New York, and that the said defendants, and each of them, reside in the City of Buenos Aires, Argentine Republic, and have an office and place for the transaction of their business at No. 1382 Calle Alsina, in said City of Buenos Aires, it is, on motion of Messrs. Erwin, Fried & Czaki, solicitors for the above-named plaintiff

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ORDERED that the said defendants David Costaguta, Marcos A. Algiers, Alejandro Sassoli and Eugenio Ottolenghi be and they hereby are directed to appear, plead, answer or demur to the Bill of Complaint herein on or before the 28th day of April, 1920; and it is further

ORDERED that a copy of this order, together with a copy of said Bill of Complaint and Subpoena herein, shall be served upon the said David Costaguta, Marcos A. Algiers, Alejandro Sassoli and Eugenio Ottolenghi as follows:

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1st. By delivering a copy of this order, together with a copy of said Bill of Complaint and Subpoena, to and leaving the same with one Leon Grumet, in

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*Order for Substituted Service.*

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the City of New York, Borough of Manhattan, Southern District of New York.

2nd. By enclosing a copy of this order, together with a copy of said Bill of Complaint and said Subpoena, in a securely postpaid wrapper, addressed to the said David Costaguta, Marcos A. Algiers, Alejandro Sassoli and Eugenio Ottolenghi at No. 1382 Calle Alsina, in the City of Buenos Aires, Argentine Republic, and depositing the same, duly postpaid, in the United States Mail on or before the 17th day of March, 1920.

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3rd. That a copy of this order shall be published in the Evening Post, a daily newspaper, published in the City and County of New York, on the 17th, 24th and 31st days of March and the 7th, 14th and 21st days of April, 1920.

LEARNED HAND,  
U. S. D. J.

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The foregoing affidavit and order for substituted service are marked filed United States District Court, Southern District of New York, March 17, 1920.

*Order for Substituted Service.*

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I HEREBY CERTIFY that on the 19th day of March, 1920, at the City of New York, in my district, I personally served the within affidavit and order upon the within-named Leon Grumet, as agent and attorney in fact for David Costaguta, Marcos A. Algiers, Alejandro Sassoli and Eugenio Ottolenghi, by exhibiting to him at #22 White St., New York City, N. Y., the within originals, and at the same time leaving with him a copy of each thereof, and at the same time and place left with him a copy of bill of complaint and subpoena in equity in this suit.

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THOMAS D. McCARTHY,  
United States Marshal,  
Southern District of New York.

Dated, March 20, 1920.

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The foregoing return of the Marshal is attached to the order for substituted service.

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**346      Notice of Special Appearance of Resi-  
dent Defendants.**

IN THE  
DISTRICT COURT OF THE UNITED STATES  
FOR THE SOUTHERN DISTRICT OF NEW YORK.

HENRY S. DE REES,  
Plaintiff,

against

**347      DAVID COSTAGUTA, MARCOS A.  
ALGIERS, ALEJANDRO SASSOLI,  
EUGENIO OTTOLENGHI, individu-  
ally and as copartners in busi-  
ness, composing the copartner-  
ship of David Costaguta &  
Company, Renado Taffell and  
the American-European Trad-  
ing Corporation,  
Defendants.**

**348      PLEASE TAKE NOTICE** that the undersigned hereby  
appear in the above-entitled action for said defend-  
ants Renado Taffell and the American-European  
Trading Corporation specially and solely for the  
purpose of objecting to the jurisdiction of this Court  
and for the purpose of herein opposing the motion  
made on an order to show cause made herein by  
Hon. Learned Hand, District Judge, dated March  
10, 1920, for the appointment of a receiver and for  
an injunction pendente lite, and you will

*Notice of Special Appearance.*

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PLEASE TAKE NOTICE that the undersigned do not appear for any of the other defendants in said action nor do they appear generally for said defendants Renado Taffell and the American-European Trading Corporation, or either of them, or otherwise than as herein expressly specified.

Dated, New York, March 19, 1920.

Yours, &c.,

ESSELSTYN & HAUGHWOUT,  
Attorneys for defendants Renado Taffell and the American-European Trading Corporation, specially as above indicated. 350

To:

ERWIN, FRIED & CZAKI, Esqs.

The foregoing notice of appearance is marked filed United States District Court, Southern District of New York, March 19, 1920.

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**Notice of Special Appearance of Non-Resident Alien Defendants.**

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

HENRY S. DE REES,  
Plaintiff,

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against

DAVID COSTAGUTA, MARCOS A.  
ALGIERS, ALEJANDRO SASSOLI,  
EUGENIO OTTOLENGHI, individu-  
ally and as copartners in busi-  
ness, composing the partner-  
ship of David Costaguta &  
Company, Renado Taffell and  
the American-European Trad-  
ing Corporation,  
Defendants.

Equity—  
17-201.

354 *Sirs:*

PLEASE TAKE NOTICE that the undersigned hereby appears in the above-entitled action for said defendants David Costaguta, Marcos A. Algiers, Alejandro Sassoli and Eugenio Ottolenghi, individually and



*Notice of Special Appearance.*

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as copartners in business, composing the copartnership of David Costaguta & Company, specially and solely for the purpose of applying to this Court for an order vacating, quashing and setting aside the alleged services of the subpoena issued herein on the 10th day of March, 1920, alleged by Thomas D. McCarthy, as United States Marshal for the Southern District of New York, to have been made by him on the copartnership of David Costaguta & Company on the 10th day of March, 1920, and on the defendants David Costaguta, Marcos A. Algiers, Alejandro Sassoli and Eugenio Ottolenghi on the 19th day of March, 1920, and also for an order vacating, quashing and setting aside the order made herein by the Honorable Learned Hand, one of the Justices of this Court, dated the 16th day of March, 1920, and filed in the Office of the Clerk of this Court on the 17th day of March, 1920, directing that substituted service herein be made as to the said defendants David Costaguta, Marcos A. Algiers, Alejandro Sassoli and Eugenio Ottolenghi in the manner therein provided; and

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PLEASE TAKE NOTICE that the undersigned does not appear for any of the other defendants in this action nor does he appear generally for the said defendants David Costaguta, Marcos A. Algiers, Alejandro Sassoli and Eugenio Ottolenghi, either as individuals or as such copartners, or either or any

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*Notice of Special Appearance.*

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of them, or otherwise than as herein is expressly specified.

Dated, New York, March 23rd, 1920.

Yours, etc.,

WALTER H. MERRITT,  
Attorney for Defendants David  
Costaguta, Marcos A. Algiers,  
Alejandro Sassoli and Eugenio  
Ottolenghi, appearing specially  
for the purposes hereinbefore  
mentioned and not appearing  
generally in the action,

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54 Wall Street,  
Borough of Manhattan,  
City of New York.

To:

ERWIN, FRIED & CZAKI, Esqrs.,  
Attorneys for Plaintiff,  
15 William Street,  
Borough of Manhattan,  
New York City.

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The foregoing notice of appearance is marked  
filed United States District Court, Southern Dis-  
trict of New York, March 23, 1920.

**Supplemental Special Appearance of      361**  
**Non-resident Alien Defendants.**

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

HENRY S. DE REES,  
 Plaintiff,

against

DAVID COSTAGUTA, MARCOS A.  
 ALGIERS, ALEJANDRO SASSOLI,  
 EUGENIO OTTOLENGHI, individu-  
 ally and as copartners in busi-  
 ness, composing the partner-  
 ship of David Costaguta &  
 Company, Renado Taffell and  
 the American-European Trad-  
 ing Corporation,  
 Defendants.

Equity—  
 17-201.

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*Sirs:*

PLEASE TAKE NOTICE that in addition to the pur-  
 poses for which the said defendants David Costa-  
 guta, Marcos A. Algiers, Alejandro Sassoli and  
 Eugenio Ottolenghi, individually and as copartners  
 in business, composing the copartnership of David  
 Costaguta & Company, appeared specially in and by  
 their special appearance dated and filed in the office  
 of the Clerk of this Court on the 23rd day of March,

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*Second Notice of Special Appearance.*

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1920, the said defendants also appear specially for the purpose of opposing the motion made by the plaintiff herein on the order to show cause made by Hon. Learned Hand, one of the Justices of this Court, dated the 10th day of March, 1920, on the ground that this Court has no jurisdiction over the said defendants and has no jurisdiction over the cause of action attempted to be set forth in the bill of complaint filed herein on the 10th day of March, 1920.

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PLEASE TAKE NOTICE FURTHER that the undersigned does not appear for any of the other defendants in this action nor does he appear generally for the said defendants David Costaguta, Marcos A. Algiers, Alejandro Sassoli and Eugenio Ottolenghi, or either or any of them, or otherwise than is specified in the said notice of special appearance dated and filed in the office of the Clerk of this Court on the 23rd day of March, 1920, and as is herein expressly specified.

Dated, New York, March 26, 1920.

Yours, etc.,

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WALTER H. MERRITT,  
Attorney for Defendants David  
Costaguta, Marcos A. Algiers,  
Alejandro Sassoli and Eugenio  
Ottolenghi, appearing specially  
for the purposes hereinbefore  
mentioned and not appearing  
generally in the action,

54 Wall Street,  
Borough of Manhattan,  
New York City.

*Second Notice of Special Appearance.*

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To:

ERWIN, FRIED & CZAKI, Esqs.,  
Attorneys for plaintiff,  
15 William Street,  
Borough of Manhattan,  
New York City.

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The foregoing notice of appearance is marked  
filed United States District Court, Southern Dis-  
trict of New York, March 26, 1920.

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**370 Order to Show Cause Why Service of  
Subpoena and Order for Substituted  
Service Should Not Be Vacated.**

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

HENRY S. DE REES,  
Plaintiff,

against

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DAVID COSTAGUTA, MARCOS A.  
ALGIERS, ALEJANDRO SASSOLI,  
EUGENIO OTTOLENGHI, individu-  
ally and as copartners in busi-  
ness, composing the copartner-  
ship of David Costaguta &  
Company, Renado Taffell and  
the American-European Trad-  
ing Corporation,  
Defendants.

Equity—  
17-201.

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UPON the subpoena issued herein on the 10th day of March, 1920, the Bill of Complaint herein, verified the 10th day of March, 1920, the certificates of Thomas D. McCarthy, United States Marshal for the Southern District of New York, dated the 11th day of March, 1920, wherein he certifies that on the 10th day of March, 1920, at the City of New York, in the Southern District of New York, he served the said subpoena "upon the within defendant and

*Order to Show Cause.*

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David Costaguta Co. by exhibiting to Leon Grumet, as agent and attorney-in-fact, at #22 White St., N. Y. City, the within original, and at the same time leaving with him a copy thereof," the certificate of the said United States Marshal, dated the 20th day of March, 1920, wherein he certifies that on the 19th day of March, 1920, at the City of New York, in the Southern District of New York, he personally served the subpoena "upon the within-named defendants David Costaguta, Marcos A. Algiers, Alejandro Sassoli and Eugenio Ottolenghi by exhibiting to Leon Grumet, as agent and attorney-in-fact for said defts. at #22 White St., N. Y., the within original, and at the same time leaving with him a copy thereof," both of which said certificates are attached to the said subpoena now on file in the Office of the Clerk of this Court, the certificate of said United States Marshal, dated the 10th day of March, 1920, wherein he certifies that after due and diligent search he was unable "to find the within-named David Costaguta, Marcos A. Algiers, Alejandro Sassoli and Eugenio Ottolenghi" in the Southern District of New York upon the notice of special appearance of the said defendants David Costaguta, Marcos A. Algiers, Alejandro Sassoli and Eugenio Ottolenghi, individually and as copartners in business composing the copartnership of David Costaguta & Co., filed in the Office of the Clerk of this Court on the 22nd day of March, 1920, the order made by the Honorable Learned Hand, one of the Justices of this Court, dated the 16th day of March, 1920, and filed in the Office of the Clerk of this Court on the 17th day of March, 1920,

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*Order to Show Cause.*

directing that substituted service be made as to the defendants David Costaguta, Marcos A. Algiers, Alejandro Sassoli and Eugenio Ottolenghi in the manner therein provided, the affidavit of Frederick M. Czaki, verified the 15th day of March, 1920, attached to and upon which the said order was made, and the annexed affidavit of Leon Grumet, verified the 23rd day of March, 1920,

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LET the plaintiff above named, or his attorneys, Messrs. Erwin, Fried & Czaki, show cause before this Court at a stated term thereof to be held for the hearing of motions in the United States Post Office Building, in the Borough of Manhattan, City of New York, on the 26th day of March, 1920, at 10 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, WHY an order should not be made and entered in the above-entitled action:

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(1) Vacating, quashing and setting aside such alleged services of the said subpoena on the partnership of David Costaguta & Co. and on the defendants David Costaguta, Marcos A. Algiers, Alejandro Sassoli and Eugenio Ottolenghi, and declaring that such alleged services of the said subpoena be null and void. Said motion will be made on the following grounds, among other things: That at the time of the alleged services of the said subpoena the said partnership of David Costaguta & Company and the said defendants David Costaguta, Marcos A. Algiers, Alejandro Sassoli and Eugenio Ottolenghi were not personally served with the said subpoena within the jurisdiction of this Court, were not then



within the jurisdiction of this Court and could not be found therein; that Leon Grumet, on whom the alleged services of the said subpoena were made by the said United States Marshal, was not authorized by David Costaguta & Company and by David Costaguta, Marcos A. Algiers, Alejandro Sassoli and Eugenio Ottolenghi, or by any of them, to accept service of process issued by this Court or by any other Court in behalf of them or any of them; that the entry of a judgment based upon such alleged services of the said subpoena upon said Leon Grumet, as the agent and attorney-in-fact for the partnership of David Costaguta & Company, and for the individual defendants David Costaguta, Marcos A. Algiers, Alejandro Sassoli and Eugenio Ottolenghi, within the jurisdiction of this Court at the times aforesaid, and the enforcement and collection of any judgment founded thereon, would, if permitted by this Court, deprive the partnership of David Costaguta & Company and of the individual defendants David Costaguta, Marcos A. Algiers, Alejandro Sassoli and Eugenio Ottolenghi of property without due process of law.

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(2) Vacating, quashing and setting aside the said order made by the Honorable Learned Hand, dated the 16th day of March, 1920, and filed in the Office of the Clerk of this Court on the 17th day of March, 1920, directing the defendants David Costaguta, Marcos A. Algiers, Alejandro Sassoli and Eugenio Ottolenghi to appear, plead, answer or demur to the said Bill of Complaint on or before the 20th day of April, 1920, on the ground that this action is

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*Order to Show Cause.*

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not an action "to enforce any legal or equitable lien upon or claim to, or to remove any encumbrance or lien or cloud upon the title to real or personal property" within the Southern District of New York and therefore is not an action in which this Court by virtue of the provisions of Section 57 of the Judicial Code is authorized to make an order for substituted service as to necessary parties defendants who cannot be personally served within the jurisdiction of this Court, and on the further ground that it appears from the said Bill of Complaint and the prayer for relief demanded therein that any judgment entered against the said defendants David Costaguta, Marcos A. Algiers, Alejandro Sassoli and Eugenio Ottolenghi must necessarily be a personal judgment *in personam* against said defendants David Costaguta, Marcos A. Algiers, Alejandro Sassoli and Eugenio Ottolenghi which this Court will be powerless to enforce as against said defendants, and on account of that fact lacks jurisdiction as to said Bill of Complaint and the cause of action attempted to be set forth therein.

Service of this Order to Show Cause on the plaintiff or on his attorneys, Messrs. Erwin, Fried & Czaki, on or before March 24th, 1920, shall be sufficient.

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Dated, New York, March 23rd, 1920.

LEARNED HAND,  
U. S. D. J.

**Affidavit of Leon Grumet on Application for Order to Show Cause.** 385

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

HENRY S. DE REES,  
Plaintiff,

against

DAVID COSTAGUTA, MARCOS A.  
ALGIERS, ALEJANDRO SASSOLI,  
EUGENIO OTTOLENGHI, individu-  
ally and as copartners in busi-  
ness, composing the copartner-  
ship of David Costaguta &  
Company, Renado Taffell and  
the American-European Trad-  
ing Corporation.  
Defendants.

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Equity—  
17-201.

UNITED STATES OF AMERICA,  
SOUTHERN DISTRICT OF NEW YORK, } ss.:  
COUNTY OF NEW YORK, }

LEON GRUMET, being duly sworn, says that he is 387  
the Leon Grumet mentioned in that certain cer-  
tificate dated March 11th, 1920, made by Thomas  
D. McCarthy as United States Marshal for the  
Southern District of New York, wherein said United  
States Marshal alleges that on the 10th day of

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*Affidavit of Leon Grumet.*

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March, 1920, he made service of the subpoena herein upon the parties therein mentioned. That said certificate reads as follows:

"I HEREBY CERTIFY, that on the 10th day of March, 1920, at the City of New York, in my district, I served the within subpoena in equity upon the within-named defendant and David Costaguta Company by exhibiting to Leon Grumet as agent and attorney-in-fact at #22 White St., N. Y. City, the within original, and at the same time leaving with him a copy thereof.

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THOMAS D. MCCARTHY,  
United States Marshal,  
Southern District of New York.

Dated, March 11th, 1920."

That is the Leon Grumet who is mentioned in that certain certificate dated March 20th, 1920, made by Thomas D. McCarthy, as United States Marshal for the Southern District of New York, wherein said United States Marshal alleges that on the 19th day of March, 1920, he made service of the subpoena herein upon certain defendants therein mentioned. That said certificate reads as follows:

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"I HEREBY CERTIFY, that on the 19th day of March, 1920, at the City of New York, in my district, I personally served the within Subpoena in Equity upon the within-named defendants, David Costaguta, Marcos A. Algiers, Alejandro Sassoli and Eugenio Ottolenghi, by

*Affidavit of Leon Grumet.*

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exhibiting to Leon Grumet as agent and attorney in fact for said defts. at #22 White St., N. Y., the within original, and at the same time leaving with him a copy thereof.

THOMAS D. MCCARTHY,  
United States Marshal,  
Southern District of New York.

Dated, March 20, 1920."

That the defendants David Costaguta, Alejandro Sassoli and Eugenio Ottolenghi are all citizens and inhabitants of the Kingdom of Italy and all actually reside in the City of Buenos Aires, Republic of Argentina, South America; that the defendant Marcos A. Algiers is a citizen and subject of the Republic of France and an actual resident of said City of Buenos Aires; that the said defendants David Costaguta, Marcos A. Algiers, Alejandro Sassoli and Eugenio Ottolenghi constitute the co-partnership of David Costaguta & Company and are engaged in business in the said City of Buenos Aires, where they have their principal office and place of business. 392

That on the 17th day of February, 1920, said co-partnership of David Costaguta & Company gave to him a certain Power of Attorney to do certain acts in behalf of said co-partnership, but no authority was given to him in and by said Power of Attorney, or otherwise, to accept service of legal process of this Court or of any other Court in behalf of said co-partnership of David Costaguta & Company or of the individual members constituting 393

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*Affidavit of Leon Grumet.*

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said co-partnership. That said Power of Attorney states expressly that nothing therein contained shall be construed so as to imply any authority in deponent to accept service of summons or other legal process in any suit brought against the partnership of David Costaguta & Company.

That deponent makes this affidavit solely for the purposes of the attached order to show cause.

That no previous application for this order has been made to any Court or Judge.

LEON GRUMET.

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Sworn to before me this  
23rd day of March, 1920.

EDGAR B. MAGNUS,  
Notary Public,

Kings County, N. Y., No. 212.

Kings County Register's No. 1035.

Certificate filed in New York County, No. 51.

New York County Register's No. 1195.

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The foregoing affidavit and order to show cause are marked filed United States District Court, Southern District of New York, April 7, 1920.

**Affidavit of Leon Grumet Submitted in    397**  
**Opposition to Jurisdiction and Ap-**  
**plication for Receiver and In-**  
**junction.**

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

HENRY S. DE REES,  
 Plaintiff,

against

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DAVID COSTAGUTA, MARCOS A.  
 ALGIER, ALEJANDRO SASSOLI,  
 EUGENIO OTTOLENGHI, indi-  
 vidually and as copartners in  
 business composing the copart-  
 nership of David Costaguta &  
 Company, Renado Taffell and  
 the American-European Trad-  
 ing Corporation,  
 Defendants.

STATE OF NEW YORK, }  
 COUNTY OF NEW YORK, } ss. :

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LEON GRUMET, being duly sworn, deposes and  
 says:

1. That he is and ever since its organization in  
 February, 1920, has been the president of said de-

fendant American-European Trading Corporation; that for a period of about eleven years prior to February 16, 1920, with the exception of the fifty-eight months spent by him in the French Army, he was in the employ of David Costaguta & Company and that he resides in the Borough of Manhattan, City of New York, and makes this affidavit solely on behalf of said defendants American-European Trading Corporation and Renado Taffell.

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2. Upon information and belief denies that in or about the month of April, 1915, or at any other time, said plaintiff entered into a contract of co-partnership with David Costaguta and Marcos A. Algier, who were then doing business under the firm name and style of David Costaguta & Company, as alleged in paragraph "III" of the plaintiff's affidavit, and further denies upon information and belief that by any contract between the plaintiff and the firm of David Costaguta & Company it was provided that a copartnership thereby was established and created, and that the contract referred to in said paragraph provided that the business to be transacted thereunder should be a co-partnership business between said plaintiff and David Costaguta & Company and denies that said plaintiff was to have entire control and direction of the conduct and management of said business and of the purchase and sale of its merchandise or otherwise than as expressly provided in said agreement. Deponent further denies that the terms and conditions of said contract are accurately alleged either in substance or in effect in said plaintiff's affidavit in paragraph "V" thereof, and denies that

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any copartnership between said plaintiff and said David Costaguta & Company ever existed from the month of April, 1915, to and including October 31, 1917, or that the plaintiff was engaged in any business whatever at that or any other times as a copartner with said firm as alleged in paragraph "VI" of plaintiff's affidavit.

3. Deponent further denies upon information and belief that on or about November 1, 1917, or at any other time any contract of copartnership was entered into between said plaintiff and the firm of David Costaguta & Company as the same was reconstituted in or about the month of October, 1917. Deponent alleges that on or about November 1, 1917, said plaintiff did enter into a contract with said firm of David Costaguta & Company, which said firm consisted of David Costaguta, Marcos A. Algier, Alejandro Sassoli and Eugenio Ottolenghi; that said contract was made at Buenos Aires, Argentina, and was written in the Spanish language, and he believes that the copy of said contract in Spanish attached to the moving papers herein is a true copy thereof; deponent denies that "Exhibit B," annexed to the moving affidavits, is a true or accurate translation into English of said contract and alleges that said alleged translation is inaccurate and is not a correct translation of the original; that annexed hereto marked "Exhibit A" is a true and correct translation of said original contract. Deponent further denies that either the substance or effect of said contract of November 1, 1917, is truly or accurately set out in subdivisions "a" to "n," both inclusive, of paragraph "VII" of

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the plaintiff's affidavit herein, and refers to the contract itself and to the correct translation thereof, which is hereto annexed marked "Exhibit A."

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4. Deponent denies on information and belief that any copartnership between said plaintiff and the firm of David Costaguta & Company as then re-constituted assumed all or any of the liabilities of any copartnership theretofore existing between said plaintiff and said David Costaguta & Company or that it took over all or any of the assets thereof as alleged in paragraph "IX" of the plaintiff's affidavit, and deponent denies each and every allegation or inference in paragraph "IX" or in any other paragraph of the plaintiff's affidavit contained to the effect that there was a copartnership between said plaintiff and said David Costaguta & Company.

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5. Deponent alleges upon information and belief that said contract dated November 1, 1917, between said plaintiff and said firm of David Costaguta & Company did not and was not intended to constitute a copartnership between said plaintiff and said firm and alleges upon information and belief that no partnership relation has ever existed between said plaintiff and said firm; that the source of deponent's information and the ground of his belief as to the fact that said contract of November 1, 1917, did not constitute or give rise to a partnership between said plaintiff and said firm of David Costaguta & Company, are, among other things, as hereinafter alleged, the annexed affidavit of Dr. M. Garza-Aldapa, verified March 26th, 1920.

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Deponent is advised and verily believes that the parties to said contract have, since the making thereof, by their own actions, placed an interpretation upon said contract which is wholly inconsistent with the claim that such contract constituted or was intended to constitute a copartnership between said plaintiff and said firm of David Costaguta & Company.

6. That said firm of David Costaguta & Company is a very large commercial house located in Buenos Aires, Argentina, and that it does a very large and extensive business not only in Argentina, but throughout the world; that the business of said firm is of a most varied and diversified character and consists among other things in the buying and selling of practically all kinds of merchandise, including cotton, cotton goods, hides, leathers, chemicals, foodstuffs, gasoline, silks, hosiery, hardware, &c., &c.; that said firm has a large invested capital upwards of 4,000,000 Argentina pesos, paper; that under the business establishment of said firm it has numerous departments or sections for handling the various classes of commodities in which said firm deals; that said departments or sections, however, are all part and parcel of the one general business of said firm, and said firm keeps only one general set of books in which the accounts of all its transactions are entered and no effort is made to segregate the funds in its general bank accounts derived from or connected with the business of the several departments or sections; that the general books of account of said firm covering all its transactions are and at all times have been kept at

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Buenos Aires, Argentina; that there are kept at the various agencies of said firm local books of account in which are entered the transactions which pass through said several agencies and that prior to December 27, 1917, when said plaintiff came to this country, all the business that said plaintiff had transacted for said firm in this country was transacted directly through the home office in Buenos Aires, Argentina. That one of the departments of the business of said firm of David Costaguta & Company was the hosiery business which was transacted under the heading of the "Hosiery Section," of which said plaintiff had the immediate direction; that said department in no sense constituted a separate or distinct business in the sense that it was segregated from the other general business of said firm; that no effort was ever made to keep the funds derived from or connected with the business of the hosiery section separate from the other general funds of said firm; that no separate set of books was kept for said hosiery section, although a separate memorandum account was kept showing the aggregate amount of business passing through said hosiery section, but neither in this respect or in any other respect was the business passing through said so-called section treated as distinct or separate from the general business of said firm.

7. Deponent further says upon information and belief that when said plaintiff came to this country in December, 1917, he came for the express purpose of buying hosiery for said firm and shipping the same to Argentina for sale there and in other South American countries; that said plaintiff did

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not come to this country with an expectation or intention of staying here or of opening a permanent agency for said firm of David Costaguta & Company here, but came on a temporary business trip with the expectation of returning within a month or two to Buenos Aires, Argentina, where the main business of the firm, including the hosiery section, was transacted and where, as general manager of the hosiery section, he was to superintend the sale of the hosiery purchased by him in the United States. That on or about the 19th of February, 1918, said plaintiff sent a cablegram to the firm at Buenos Aires in which, among other things, he said:

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"Conditions prohibit leaving before month more. Notify wife."

That on or about February 21, 1918, said David Costaguta & Company wrote to said plaintiff acknowledging receipt of said cablegram and saying, among other things:

"About your sailing from New York we have cabled you today in order that you await this letter of ours before leaving for here (Buenos Aires). We have done this because next month probably at the middle of March one of our employees will sail for there (New York) who will settle down in that town to look after any of our business in general \* \* \* in representing our house and will also take care there (New York) of everything referring to existing contracts for hosiery, looking after shipments, etc. \* \* \*"

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That the representative of said David Costaguta & Company referred to in said letter as coming to New York to open a branch office in New York was Giuseppe Brugnago. That in a letter written by said firm to said plaintiff dated March 9, 1918, it was said among other things:

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"Mr. Brugnago brings with him our instructions for everything relating to the program which our new branch office will develop. Regarding the hosiery we will thank you to inform him respecting all operations in course and generally of all pending matters in order that he may follow them with full knowledge after your departure."

That on February 13, 1918, said firm of David Costaguta & Company cabled to said plaintiff as follows:

"Telegraph when you will approximately return."

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Upon information and belief said plaintiff has at all times transacted said business of the hosiery section, not by virtue of any relationship of copartnership with the firm of David Costaguta & Company, but by virtue of authority conferred upon him by said firm. That said firm of David Costaguta & Company, among other things, executed and delivered to him an express written power of attorney authorizing him to bring suits in the name of said firm of David Costaguta & Company and in the exercise of the authority conferred by said written power of attorney he did institute suits on be-

half of said firm of David Costaguta & Company. That when he came to this country to purchase hosiery his authority was expressly limited to the purchase of not exceeding \$500,000 worth; that annexed hereto and marked "Exhibit B" is a copy of an original letter of instructions given to said plaintiff before he left Buenos Aires and that hereto annexed, marked "Exhibit D," is an English translation of said letter. That on or about January 2, 1918, said firm sent a cable to said plaintiff, a copy of which is hereto annexed, marked "Exhibit E," together with an English translation thereof marked "Exhibit F," restricting his authority to purchase hosiery to \$250,000.

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8. That in or about the month of 1918, said plaintiff, on behalf of said firm of David Costaguta & Company, entered into a contract with F. Y. Kitzmiller, trading as Frank Y. Kitzmiller Trading Company, wherein and whereby said Kitzmiller agreed to manufacture and deliver to said firm 15,000 dozen hose; that thereafter said Kitzmiller defaulted upon his said contract and said plaintiff, on behalf of said firm of David Costaguta & Company, caused to be instituted in the Court of Common Pleas, Berks County, Pennsylvania, an action by said firm against said Kitzmiller to recover damages for the breach of said contract; that in said action said plaintiff, H. S. De Rees, was not named as one of the parties plaintiff, although he himself verified the bill of complaint therein; that annexed hereto and marked "Exhibit G" is a copy of the verified bill of complaint filed in said action, from which it appears that said De Rees swore that

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the partnership of David Costaguta & Company, which was one of the parties to said hosiery contract, was composed of David Costaguta, Marcos A. Algier, Alejandro Sassoli and Eugenio Ottolenghi, and that he did not claim in said complaint to be one of the partners or a copartner with said firm or a necessary party to said action.

9. Upon information and belief that never since the first contract of April, 1915, was made between said plaintiff and said firm of David Costaguta & Company did said plaintiff sign or endorse checks or promissory notes in connection with the business of said hosiery section nor did he sign the name of David Costaguta & Company as a partner, but always with the addition, "by H. S. De Rees"; that the bulk of the business of the hosiery section of said firm of David Costaguta & Company has always been transacted at Buenos Aires, Argentina, and that although the hosiery section business transacted by said plaintiff in the United States during the year 1919 was of considerable extent, it was only a fractional part of the total hosiery business of said firm; that during the year ending October 31, 1919, the total hosiery business transacted by said firm in Buenos Aires was 1,800,000 Argentina pesos, equivalent to \$810,000; that on

October 31, 1919, the value of the hosiery owned by said firm in its hosiery department in Buenos Aires was approximately 725,000 Argentina pesos, equivalent to approximately \$325,000, while the value of the hosiery in the United States in its hosiery department was approximately \$115,000.



10. That when said plaintiff came to the United States it was not the purpose or plan either of himself or of said firm of David Costaguta & Company that he should sell any hosiery in the United States at all, but his sole purpose in coming here was to purchase hosiery for sale in South America; that he, however, in violation of his authority, bought much more than he was authorized to buy and as a result thereof and also as a result of there being an extensive dock strike in Buenos Aires, he was forced to sell in the United States considerable part of what he had purchased here.

11. Deponent denies that there is now in the custody of said defendant American-European Trading Corporation, in New York City, twenty-two cases of merchandise, consisting of hosiery the property of said alleged copartnership of the value of \$15,000 and which were transferred to it by said firm of David Costaguta & Company, and, on the contrary, deponent alleges that no hosiery whatever was transferred by David Costaguta & Company to said defendant the American-European Trading Corporation, and said company now owns no hosiery at all. Deponent further alleges that the only hosiery owned by said firm of David Costaguta & Company in the United States at the present time consists of about eleven cases located in New York City and which are of the approximate value of \$10,430, not including three cases which had been sold to a customer in Havana, which were about to be shipped when the injunction herein was served. Deponent further denies that all the accounts outstanding due for the sale of hosiery by

said firm of David Costaguta & Company were transferred to said defendant American-European Trading Corporation, but, on the contrary, alleges that said firm sold for a valuable consideration and transferred to said corporation only three accounts, to wit: Weill, Feinberg Co., Inc., Metals and Chemicals Corporation and Cross Hermanos; that the facts in connection with the transfer of these accounts will be fully hereinafter set forth. That, aside from the eleven cases of hosiery above mentioned and certain accounts receivable and unfilled contracts which are still owned by said firm of David Costaguta & Company in connection with the hosiery section business said firm has no other assets whatever in the United States derived from or connected with said hosiery section. Upon information and belief said firm, however, has in Buenos Aires large quantities of hosiery which it owned or had under contract prior to November 22, 1919, and which must be liquidated before the accounts between said plaintiff and said firm can be finally adjusted. That ever since said plaintiff served his notice terminating the contract of November 1, 1917, said firm of David Costaguta & Company has been ready and willing at all times to have said business liquidated as speedily as possible and the accounts adjusted between them. That to that end they have repeatedly requested and urged said plaintiff to go to Buenos Aires, Argentina, and that about the latter part of November, 1919, the firm offered to arrange for and pay all the expenses of his trip to Buenos Aires. That said plaintiff repeatedly assured said firm that it was his expectation and intention to return to Buenos

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Aires to complete the liquidation of said hosiery business and to assist in the winding up of the business under said contract of November 1, 1917. That on November 19, 1919, said firm wrote said plaintiff as follows:

"On the 17th instant Mr. Ottolenghi received a cable from David Costaguta & Company at Buenos Aires, reading as follows:

'Regarding termination of contract by De Rees indispensable De Rees to be present.'

In other words in the opinion of the head office of David Costaguta & Company it is absolutely necessary that you go to Buenos Aires at once in connection with the termination of the contract and the settlement to be made thereunder. You will please consider this letter as a request made on you by the head office at Buenos Aires to immediately go to Buenos Aires for the purpose of assisting in making the settlement."

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That on December 3, 1919, Mr. Ottolenghi, one of the members of the firm of David Costaguta & Company, who was then in New York, wrote to said plaintiff as follows:

"We understand that what you have to say in your letter of the 1st instant is to be construed by us as a refusal by you to comply with the request of our Buenos Aires Office that you go immediately to Buenos Aires. In this connection permit us to say that since writing our letter of the 19th ultimo we have received

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a further cable from Buenos Aires stating that your immediate presence in Buenos Aires is absolutely indispensable. Accordingly we urge upon you again the importance of going to Buenos Aires at once."

In a letter written by said plaintiff to said firm of David Costaguta & Company, dated December 9, 1919, he said among other things:

"Regarding my letter of the first being a refusal to go to Buenos Aires will say that this is absolutely erroneous on your part; as soon as the liquidation is completed in New York and I can get away it is my intention to go to Buenos Aires and finish the liquidation there not only of the merchandise but of the account. Regarding the importance of going to Buenos Aires there is no doubt that I understand this better than the parties writing the letter."

On December 11, 1919, Mr. Ottolenghi, on behalf of David Costaguta & Company, again wrote to said plaintiff as follows:

"We note that you intend to go to Buenos Aires as soon as the liquidation here is completed. As you know Buenos Aires has cabled that all hosiery which cannot be disposed of by the time Mr. Ottolenghi leaves for Buenos Aires should be shipped to Buenos Aires. Mr. Ottolenghi wishes to sail on the 27th instant and in accordance with the request of Buenos Aires intends on December 20th 1919 to ship

to Buenos Aires such hosiery as shall not be then disposed of. If you could plan to go to Buenos Aires with Mr. Ottolenghi on the 27th instant it would please both Mr. Ottolenghi and Buenos Aires. \* \* \* Mr. Ottolenghi also wishes to have the power of attorney held by you given to him for cancellation before he sails. Inasmuch as any hosiery not disposed of by December 20th, 1919, is to be shipped to Buenos Aires pursuant to orders from Buenos Aires we cannot see what further need you would have of the power of attorney after that date."

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That said plaintiff in a letter December 11, 1919, replying to said last-mentioned letter, made no objection whatever to the proposed shipment to Buenos Aires of the remainder of the hosiery in New York which was not sold on or before December 20, 1919. In the month of January, 1920, Mr. De Rees stated to deponent that it was still his intention of going to Buenos Aires. On February 17, 1919, Mr. De Rees told deponent that it had always been his intention of going to Buenos Aires and that he had engaged passage on every boat going to Buenos Aires for some time prior thereto, but had cancelled his engagement on each sailing, renewing his engagement for the next boat. That except that in a few relatively unimportant instances all the purchases of hosiery made by said plaintiff were made in the name and for the account of David Costaguta & Company.

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12. Upon information and belief that the books of said David Costaguta & Company at Buenos Aires have at all times been open to the inspection and examination of said plaintiff and the only reason he has not seen them since leaving Buenos Aires in November, 1917, is because he has not been willing to return to Buenos Aires where he could examine the same. Upon information and belief deponent denies that said firm has refused to furnish said plaintiff with daily statements evidencing the detailed reports of the sales made by said hosiery section and denies that said firm has refused to furnish said plaintiff with details of such sales or has refused to furnish said plaintiff with a semi-annual account current and denies that since November 1, 1918, said plaintiff has not received from said firm or from any other source any knowledge or information as to the details of the fiscal account of transactions of said hosiery section otherwise than as set forth in the moving affidavit and alleges upon information and belief that said firm has at all times furnished said plaintiff detailed statements of all of said transactions.

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13. Deponent denies that said plaintiff purchased any merchandise in the United States between November 1, 1917, and November 31, 1918, on behalf of any alleged copartnership between him and said David Costaguta & Company, as alleged in paragraph "XII" of the plaintiff's affidavit, and although said firm of David Costaguta & Company did send numerous statements of account relating to the business of its hosiery section to said plain-

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tiff, deponent denies any knowledge or information sufficient to form a belief as to whether the statements annexed to the moving papers, marked Exhibits "G," "H," "I" and "J," are correct copies or translations of any of said statements. Deponent denies that if said statements, Exhibits "G" and "I," annexed to the moving papers, are correct copies of statements sent to said plaintiff, they related to the transactions of any copartnership between said plaintiff and said firm of David Costaguta & Company. Upon information and belief, that during the period referred to in paragraph "XIII" of the plaintiff's affidavit said firm of David Costaguta & Company furnished frequent detailed statements of the business of said hosiery section to said plaintiff.

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14. Denies that said plaintiff opened an office at No. 395 Broadway or at No. 22 White Street, New York City, for the business of any copartnership between himself and said firm of David Costaguta & Company or that said plaintiff either purchased or sold or stored any merchandise for and on behalf of any such copartnership and alleges that the offices referred to were opened and the merchandise referred to was purchased or sold or stored by said plaintiff for and on account of said hosiery section, but deponent denies that on October 31, 1919, there was on hand merchandise of the value of \$750,000 and alleges that the merchandise belonging to said hosiery section which was on hand at that time did not exceed the value of approximately \$100,000. Deponent denies that the merchandise sold by said

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plaintiff in New York City was sold or that the proceeds thereof were received for the benefit of, or that any merchandise was shipped to, any copartnership between said plaintiff and said firm of David Costaguta & Company, as alleged in paragraph "XV" of the plaintiff's affidavit.

15. Deponent denies that said firm of David Costaguta & Company invested said Giuseppe Brugnago with authority to supersede and displace said plaintiff in the active management of the business of the hosiery section contrary to the contract between said plaintiff and said firm, as alleged in paragraph "XVI" of the plaintiff's affidavit, or that said Brugnago did hamper or impede said plaintiff in said business. Deponent denies that said Brugnago or anyone else opened any books of account for any copartnership between said plaintiff and said firm of David Costaguta & Company, as alleged in paragraph "XVI," or that said Brugnago was discharged and left the employ of any such copartnership. Deponent further alleges that said Brugnago was sent to the United States by the firm of David Costaguta & Company for the purpose of establishing an agency in New York for the general business of said David Costaguta & Company, it being the purpose and plan that the hosiery business of said firm transacted in the United States should be taken care of by said general agency as a part of the general business of said firm in order that said plaintiff might return to Buenos Aires and there resume his general management of the hosiery section as had been originally contemplated.



16. Upon information and belief deponent denies that Eugenio Ottolenghi told said plaintiff that David Costaguta & Company had invested more capital than it wished or any capital in the business of any copartnership between him and said firm or that the merchandise then on hand should be sold regardless of the prices realized thereon and denies that said Ottolenghi sold large quantities of said merchandise below cost or at large losses to any such copartnership or otherwise, as alleged in paragraph "XVII" of the plaintiff's affidavit, and denies each and every allegation of or reference to the existence or operations of any copartnership between said plaintiff and said firm of David Costaguta & Company as contained in paragraph "XVII" of the plaintiff's affidavit.

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17. Answering the allegations in paragraph "XVIII" deponent alleges upon information and belief that said firm of David Costaguta & Company rendered frequent detailed statements to said plaintiff of the transactions of the entire hosiery department for the year November 1, 1918, to October 31, 1919.

18. Deponent denies each and every allegation or reference in paragraphs "XIX" and "XX" of the plaintiff's affidavit of the existence or operations of any copartnership between said plaintiff and said firm of David Costaguta & Company and denies that said Ottolenghi during the time he was in New York City did anything improper or unlawful or in violation of said plaintiff's rights in connec-

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tion with said hosiery business as alleged in said paragraph "XX" of his affidavit.

19. Deponent denies that said David Costaguta & Company objected to said plaintiff selling any of the hosiery on hand, as alleged in paragraph "XXI" of the plaintiff's affidavit, and denies that large quantities of it were sold at little or no profit or at a loss or below the market value.

20. Deponent denies each and every allegation contained in paragraph "XXII" of the plaintiff's affidavit and alleges that whatever funds were on deposit in the name of David Costaguta & Company in any bank in New York or New Jersey between February 1, 1919, and February 1, 1920, belonged to said firm of David Costaguta & Company and not to any copartnership between said firm and said plaintiff.

21. That in paragraphs "XXIII" and "XXIV" of the plaintiff's affidavit he attempts to make it appear that there was a distinction or separation between the funds in the bank accounts of David Costaguta & Company in New York belonging to the hosiery business on the one hand and those belonging to the other or general business of said firm on the other hand, and the attempt is made to make it appear that said funds were improperly commingled and that said firm improperly used such commingled funds for the purpose of paying the claims of various creditors in connection with the sale to them by said firm of David Costaguta &

Company of certain hides which had no connection with or relation to the hosiery business of said firm and which said creditors had levied attachments upon all the property of said David Costaguta & Company, including the property belonging to or connected with the hosiery section. That the facts in reference to said hides are as follows: They were purchased by the firm of David Costaguta & Company in South America and were shipped to New York by said firm; that the purchase and shipment of said hides had nothing whatever to do with the hosiery section of the business of said firm; that when said hides were rejected by the purchasers and when said purchasers thereafter instituted suits to recover the purchase price and levied attachments upon a large part of the property of said David Costaguta & Company, including said hides, said firm of David Costaguta & Company remitted from Buenos Aires to its agency in New York \$130,000, which money was deposited in the Trust Company of New Jersey; that said sum of \$130,000 was deposited in said account for the express purpose of being used in raising such attachments and it was in fact so used. In this connection deponent denies that there were any monies deposited in any of the bank accounts referred to in the moving affidavit to the credit of any copartnership between said firm of David Costaguta & Company and plaintiff, or that there was any merchandise or property belonging to such a copartnership or that there was any such copartnership, as alleged in paragraphs "XXIII" and "XXIV" of the moving affidavit, or that there was

any improper commingling of funds connected with the hosiery section with other funds belonging to David Costaguta & Company and alleges that never since the inception of the hosiery business as a branch of the general business of said David Costaguta & Company was there ever any attempt made, nor was there ever any demand or request made by said plaintiff that there should be any effort made, to keep the monies derived from or connected with the hosiery business separate from the other general funds of David Costaguta & Company. Deponent further alleges that all the funds in all of said bank accounts were the sole and absolute property of David Costaguta & Company.

22. Deponent denies absolutely that in the month of January, 1920, or at any other time said firm of David Costaguta & Company conceived or put into effect any fraudulent scheme of transferring its assets for the purpose of injuring said plaintiff and to prevent him from collecting any sums justly due to him from the firm of David Costaguta & Company, as alleged in paragraph "XXV" of the plaintiff's affidavit, or otherwise; that the facts and circumstances with reference to the incorporation of said defendant American-European Trading Corporation are as follows: The business of David Costaguta & Company, including the hosiery business, which had been transacted in the United States had been transacted in the name of the firm, the members of which were non-residents. As such non-residents the assets of said firm were subject to attachments in all litigations instituted in New

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York against said firm or its members; that in the month of December, 1919, attachment proceedings involving large amounts were instituted against said firm and large quantities of the assets of said firm were levied upon and seized by the sheriff of New York County in said proceedings. In addition to the attachment proceedings which were actually commenced against said firm, Gaston, Williams & Wigmore threatened about the same time to institute an attachment proceeding to recover a large claim of over \$70,000. That as a result of the attachment proceedings which were instituted said firm of David Costaguta & Company were subjected to heavy expense and very great inconvenience and realized that its said business was being transacted at a great disadvantage as a result of all of the members of said firm being non-residents. It was thereupon decided under advice of counsel that it was desirable to organize in New York a corporation through which said firm of David Costaguta & Company could transact business in the United States. Thereupon the defendant American-European Trading Corporation was incorporated under the laws of the State of New York with a capital of \$10,000 and deponent denies that said corporation was organized in pursuance of a fraudulent scheme or conspiracy. That the stock of said company was issued to and is held by the individual members of the firm of David Costaguta & Company in the proportion in which said members are interested in the firm of David Costaguta & Company. Deponent denies that said stock was issued without consideration or in consideration of the

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transfer to the corporation of the assets and accounts of the firm of David Costaguta & Company and alleges on the contrary that said stock was paid for in cash, \$10,000 being paid into the treasury of said company at the time of the issuance of said stock. Deponent denies that all the property, merchandise, assets and funds and cash in hand and in the banks belonging to the firm of David Costaguta & Company were transferred, conveyed and set over to said corporation and denies that such transfers as were made were made without consideration or in consideration of the issuance of the capital stock of said company. On the contrary, deponent alleges that the firm of David Costaguta & Company sold to said corporation certain office furniture, including tables, chairs, &c., at the premises No. 22 White Street for \$1639.37, which said sum was paid by the corporation to the firm of David Costaguta & Company in cash; that said firm of David Costaguta & Company also sold and transferred to said corporation three separate accounts receivable, to wit, Weill, Feinberg Co., Inc., Metals & Chemicals, Inc., and Cross Hermanos, Ltd., aggregating \$57,953.04, for the face amount of said accounts said corporation delivered to said firm of David Costaguta & Company its promissory note for said sum. That no other accounts have been sold or assigned by said firm to said corporation. That said firm of David Costaguta & Company also sold and transferred to said corporation by bill of sale all the hides owned by said firm in New York and which had an aggregate value of \$91,290.62 and said corporation executed and de-

livered to said firm in payment for said hides its promissory note in said sum. That said firm of David Costaguta & Company also assigned to said corporation the lease of the premises No. 22 White Street for the nominal consideration of \$10 and in consideration of said corporation assuming the payment of the rent under said lease. That except as herein stated said firm of David Costaguta & Company has not made any other transfers or sold any other property to said corporation. That the property which was transferred and sold to the corporation was the absolute property of the firm of David Costaguta & Company and said plaintiff had no specific interest in or lien upon said property. Deponent denies that said firm of David Costaguta & Company has transferred, set over or paid to said defendant American-European Trading Corporation any hosiery whatever. Deponent denies that there was or is any property in New York or elsewhere belonging to, or that there were or are any accounts outstanding due for the sale of hosiery made by, any copartnership between said plaintiff and said firm of David Costaguta & Company, as alleged in paragraph "XXVIII" of the plaintiff's affidavit.

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23. With reference to the allegations contained in paragraphs "XXIX" and "XXX" of the plaintiff's affidavit deponent alleges upon information and belief that said plaintiff in the early part of January, 1920, stated positively that he would under no circumstances have any further personal dealing with Eugenio Ottolenghi, a member of the firm of David Costaguta & Company, who was then

471

in New York, and that thereafter he would trans-  
act all his business with the head office of said firm  
at Buenos Aires, and deponent is informed and be-  
lieves that there was no reason why said Ottolenghi  
should communicate to said plaintiff in advance any  
information about any of his movements. Depo-  
nent denies each and every allegation or inference  
in said paragraph as to the existence of any co-  
partnership between said plaintiff and said firm  
of David Costaguta & Company and deponent denies  
that said Ottolenghi caused to be sent out any no-  
tices to anyone that any copartnership between said  
473 plaintiff and the firm of David Costaguta & Com-  
pany had ceased doing business.

24. With reference to the Weill, Feinberg Co.,  
Inc., transaction, referred to in paragraph "XXV"  
of the plaintiff's affidavit, deponent alleges upon in-  
formation and belief that said transaction is a glar-  
ing instance of bad faith on the part of said plain-  
tiff; that his real purpose and intention in connec-  
tion with said transaction were not at all as he  
pretends to set forth in his bill of complaint and  
in his moving affidavit. That the only reason why  
said transaction is mentioned in said bill of com-  
plaint and affidavit is that he wishes to explain  
away an improper and fraudulent transaction.  
474 That the real facts with reference to said transac-  
tion are as follows: In or about the middle of Janu-  
ary, 1920, after the plaintiff had made the sales of  
hosiery, covered by invoices Nos. 7, 17-a, 18 and  
19, to Weill, Feinberg Co., Inc., as set out in sched-  
ule "A" annexed to the bill of complaint herein,



said Eugenio Ottolenghi became suspicious as to the bona fides of said sales on account of the fact that they were made at prices approximately 30% less than the market prices for the same hosiery in New York. Thereupon he caused Mr. W. H. Merritt, counsel for said firm of David Costaguta & Company, to notify the plaintiff of the existence of such suspicion and to advise him that the hosiery could be sold at Buenos Aires for prices far in excess of the prices of the pretended sales to Weill, Feinberg Co., Inc. On information and belief that instead of claiming that said sales had not been consummated, as now alleged in the bill of complaint, said plaintiff stoutly maintained that said sales were absolutely bona fide and that he would not consent to the hosiery being shipped to Buenos Aires, there to be sold, and that if for any reason the hosiery was not delivered to Weill, Feinberg Co., Inc., the latter would undoubtedly bring heavy suits for damages against the firm of David Costaguta & Company. On the 17th day of February, 1920, deponent, as attorney in fact of David Costaguta & Company, wrote Weill, Feinberg Co., Inc., a registered letter, a copy of which is hereto annexed, marked "Exhibit H," and received back the return receipt showing the delivery of said letter to Weill, Feinberg Co., Inc. Although said plaintiff claims in the bill of complaint and in "Exhibit A" attached thereto that he resold practically all of these goods prior to February 16, 1920, he nevertheless on February 16, 1920, wrote to Weill, Feinberg Co., Inc., a letter, copy of which is hereto attached marked "Exhibit I." On February 27, 1920,

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no reply having been made by Weill, Feinberg Co., Inc., to said letter of February 17, 1920, "Exhibit H," deponent and W. H. Merritt called upon Weill, Feinberg Co., Inc., and exhibited to Mr. Weill and Mr. Feinberg the original carbon copy of said letter of February 17, 1920, "Exhibit H," and made demand for the payment of the sum of \$28,241.58. These gentlemen replied that on February 25, 1920, their company had paid to the plaintiff the sum of \$21,708.20 in payment of the three certain invoices appearing in said letter of February 17, 1920, "Exhibit H," as bills Nos. 17-a, 18 and 19, aggregating \$21,708.20, and then and there exhibited to deponent and said W. H. Merritt a written receipt on a letterhead of David Costaguta & Company signed "David Costaguta & Company, by H. S. De Rees," acknowledging receipt of the payment of said sum of \$21,708.20.

Although said plaintiff claims in his bill of complaint and "Exhibit A" thereto attached that he sold to Weill, Feinberg Co., Inc., bill #7, containing ten items aggregating \$3810, on January 5, 1920, and that on the next day, January 6, 1920, he resold this same bill to Wm. B. Flesh of 63 Leonard Street, New York City, the fact is that on January 28, 1920, Weill, Feinberg Co., Inc., paid for said bill with its own check drawn to the order of David Costaguta & Company. Although said plaintiff claims in his bill of complaint and moving affidavit that practically all of the goods represented by bills 17a, 18 and 19, as set out in "Exhibit A" attached to the bill of complaint, are still on hand or have been sold by him to persons other than Weill, Fein-

*Affidavit of Leon Grumet.*

481

berg Co., Inc., the fact is that all of the goods represented by said bills, Nos. 17a, 18 and 19, were included in the payment of \$21,708.20 and were paid for by Weill, Feinberg Co., Inc., as shown by the receipt held by that firm for said sum. Deponent denies the plaintiff's allegations that none of the invoices covering said 65 cases of merchandise were ever delivered to Weill, Feinberg Co., Inc., and deponent has in his possession copy of a letter from Weill, Feinberg Co., Inc., acknowledging receipt of certain of said invoices, and further alleges that when he was at the office of Weill, Feinberg Co., Inc., he personally saw others of said invoices in the possession of Weill, Feinberg Co., Inc., which said plaintiff claims were never delivered.

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## LEON GRUMET.

Sworn to before me this

26th day of March, 1920.

BRADFORD BUTLER,

Notary Public,

Kings Co., No. 464.

Certificate filed in New York Co., No. 567.

Commission expires March 30th, 1921.

483

484 **Affidavit of Manuel Garza-Aldape Sub-  
mitted in Opposition to Jurisdiction  
and Application for Receiver  
and Injunction.**

IN THE

DISTRICT COURT OF THE UNITED STATES,

FOR THE SOUTHERN OF NEW YORK.

HENRY S. DE REES,

Plaintiff,

485 against

DAVID COSTAGUTA, MARCOS A.  
ALGIERS, ALEJANDRO SASSOLI,  
EUGENIO OTTOLENGHI, individu-  
ally and as copartners in busi-  
ness, composing the copartner-  
ship of David Costaguta & Com-  
pany, Renado Taffell and the  
American-European Trading  
Corporation,

Defendants.

486 STATE OF NEW YORK, }  
COUNTY OF NEW YORK. } ss. :

MANUEL GARZA-ALDAPE, having been duly sworn,  
deposes and says:

I. My name is Manuel Garza-Aldape; I am a  
native of the Republic of Mexico; I am an attorney-  
at-law, admitted to the Bar of Mexico; and I am well

acquainted with the civil law in force in Spanish America. For the last four years I have been associated with the firm of Curtis, Mallet-Prevost & Colt, 30 Broad Street, New York City, to advise them in matters of Spanish American law. I have made a special study of the laws of the Argentine Republic and am well acquainted with the same.

II. I have carefully examined a Spanish copy of the contract made at Buenos Aires, Argentine Republic, November 1, 1917, between David Costaguta and Company and Henry S. De Rees. This contract does not constitute a partnership under the Argentine law for the following reasons:

488

(a) The association is not given a firm name, an indispensable requisite in Argentine partnerships.

(b) No attempt is made to render the association a legal entity, such as partnerships are under the Argentine law.

(c) Mr. De Rees, one of the associates, is not made unrestrictedly liable towards third parties for acts done under the contract, as would be the case if the association constituted a partnership.

(d) The contract is not drawn up in the form required for partnership articles by Article 291 of the Code of Commerce of the Argentine Republic, under which article such documents must contain, in addition to the data included in the contract under consideration, clauses showing: (1) the domiciles of the parties, (2) the firm name, (3) the domi-

489

*Affidavit of Manuel Garza.*

cile of the partnership, (4) the organization of the management and the mode of surveillance.

III. It is evident that the parties themselves never regarded their association as a partnership, since they made no attempt to record the contract in the Registry of Commerce, as is required with respect to all articles of partnership.

IV. Of the distinct forms of association recognized by the Argentine law, the association formed by the contract under examination most closely resembles the loose association called "accidental or participating association" and which is thus defined in the Code of Commerce:

"Article 395. A participating association is the accidental (temporary) joining of two or more persons for one or more specific and transitory commercial operations, one, some or all of them acting in their individual name, without a firm name, and without fixing a domicile."

V. In an accidental or participating association title to the merchandise dealt in is not vested in the association but in the person or persons in whose name the merchandise is purchased.

MANUEL GARZA-ALDAPE.

Sworn to before me this  
27th day of March, 1920.

MANUEL MATZENO,  
Notary Public,  
N. Y. County.

(Seal)

**Affidavit of Arthur Manly Submitted in      493**  
**Opposition to Jurisdiction and Ap-**  
**plication for Receiver and In-**  
**junction.**

IN THE

DISTRICT COURT OF THE UNITED STATES,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

HENRY S. DE REES,  
 Plaintiff,

vs.

DAVID COSTAGUTA *et al.*,  
 Defendants.

Affidavit.

494

STATE OF NEW YORK, }  
 COUNTY OF NEW YORK, } ss. :

ARTHUR MANLY, being duly sworn, deposes and says:

That he knows both the Spanish and English languages and is employed by the firm of Curtis, Mallet-Provost & Colt, 30 Broad Street, New York City, in the capacity of a translator to translate documents and papers written in the Spanish language into the English language and documents and papers written in the English language into the Spanish language, and has been employed in such capacity for five years.

495

496

*Affidavit of Arthur Manly.*

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That he has carefully compared the English translation of the contract between David Costaguta & Company and Henry S. De Rees, dated Buenos Aires, November 1st, 1917, which is annexed hereto, with the Spanish copy of the contract attached as Exhibit A to the affidavit of Henry S. De Rees, verified the 10th day of March, 1920, forming one of the papers upon which the order to show cause was made herein by Hon. Learned Hand, dated March 10th, 1920, and states that the annexed translation is a true, correct and accurate translation of said Spanish copy of the said contract.

497

ARTHUR MANLY.

Sworn to before me this  
27th day of March, 1920.

MANUEL MATZENO,  
Notary Public,  
(Seal) N. Y. County.

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498

The translation of the contract referred to in the foregoing affidavit as Exhibit A is omitted. It is identical with and printed as Exhibit B, annexed to the affidavit of the plaintiff on page 82 hereof.



**Exhibits Annexed to the Affidavit of      499**  
**Leon Grumet.**

**EXHIBIT B.**

B. Aires, 30 de Noviembre 1917.

Senor H. S. De Rees,  
 Ciudad.

Muy senor nuestro:

Resumimos a continuacion los asuntos que motivan su actual viaje a Norte America:

1. Los varios pleitos que tenemos entablados contra fabricantes per falta de entrega a malas entregas, y definir cualquier reclamacion que tengamos pendiente. 500

2. Seguir y cuidar la ejecucion de los contratos en curso con los varios fabricantes, bajo las condiciones y garantias ya establecidas.

Por lo que se refiere a nuevas compras de medias, podra Ud. efectuarlas hasta la suma de U\$S.500000,—(Quinientosmil Dollars), y debera Ud. darnos a la conclusion de cada negocio, aviso y remitirnos para nuestro gobierno un ejemplar de cada contrato.

Si alguno u otro de los tipos de medias que tratamos, tuviese aqui menor u mas lenta salida, lo tendremos a Ud. informado por telegrafe para que Ud. pueda vender con beneficio en esa algun lote de esos tipos, a se abstonga de hacer nuevas compras en los mismos. Asimismo nos reservamos la facultad de modificar la cantidad arriba mencionada de U\$S. 500.000,—en caso que la situacion de nuestras plazas a otros motivos nos aconsejaran de hacerlo. 501

502

*Exhibits to Affidavit of Leon Grumet.*

Se servira Ud. darnos por cada correo, noticias detalladas de todas sus gestiones, soa por lo que se refiere a los pleitos y reclamaciones arriba mencionados, como por todo lo que se relaciona con la ejecucion de los contratos en curso, y el negocio en general de las Medias.

Auguramosle un feliz viaje y buen exito en todas sus gestiones y saludamosle muy cordialmente.

DAVID COSTAGUTA & CIA.

503

## EXHIBIT D.

B. Aires, November 30th, 1917.

Mr. H. S. De Rees,  
City.

Dear Sir:

We are giving you detail of the subjects, that make necessary your trip to North America:

1. The several claims that actually we have against manufacturers for not or wrong deliveries, and define any other pending claim.

504

2. To follow and take care of the Contracts in force with several manufacturers, under the conditions and guaranties established.

Therefore, in reference to new purchases of hosiery you can do it, up to the amount of \$500.000 (Five hundred thousand Dollars) and as soon as you finish each transaction you ought to give us

*Exhibits to Affidavit of Leon Grumet.*

505

advice, and send for our knowledge a copy of each contract.

If some of the styles of hosiery that we have talked about, was not accepted here or difficult to sell, we shall give you telegraphic information, so you can sell with profit in that City some merchandise of those styles, or you do not make any purchase of same. We reserve our right of modifying the amount above mentioned of \$500,000.—in case that the situation of our business and market, would advise us to do it.

You will give us by each mail, detail and notice of all your transactions, either referring to claims as above mentioned, or referring to the execution of the Contracts in force, and in general concerning to the hosiery business.

506

We wish for you a very happy trip, and success in all your transactions.

Yours very truly,

DAVID COSTAGUTA & CO.

507

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*Exhibits to Affidavit of Leon Grumet.*

## EXHIBIT E.

January 2nd, 1918.

DERESCOSTA

NEW YORK

HOSIERY BOHRWINDE DUTI-  
 ABLE ASSEMBLATO ADDRAP-  
 PARE CROPSIA ADENOPHORE  
 NOTHING FOR CHILE ASOAK

509

COSTAGUTA.

## EXHIBIT F.

## TRANSLATION.

## CODE WORD

HOSIERY	Hosiery
BOHRWINDE	Sale for the month amount to..
DUTIABLE	60000
ASSEMBLATO	Weak and Dull market
ADDRAPPARE	Buy only
CROPSIA	250,000 Dollars
ADENOPHORE	Do not buy
NOTHING	Nothing
FOR	for
CHILE	Chile
ASOAK	Market heavy and dull.

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## EXHIBIT G.

DAVID COSTAGUTA, MARCOS A. AL-  
GEIRS, ALEJANDRO SASSOLI, and  
EUGENIO OTTOLENGHI, a co-  
partnership trading as DAVID  
COSTAGUTA & COMPANY

vs.

FRANK Y. KITZMILLER, trading  
as F. Y. KITZMILLER Co., suc-  
cessor to BECHTELSTVILLE HO-  
SIERY MILLS

In the Court  
of Common  
Pleas of Berks  
County  
No. 69 October  
Term, 1919.  
In Assumpsit

512

## PLAINTIFF'S STATEMENT.

David Costaguta, Marcos A. Algeirs, Alejandro Sassoli, and Eugenio Ottolenghi, a co-partnership trading as David Costaguta & Company, of Buenos Aires, Republic of Argentina, South America, claims of Frank Y. Kitzmiller of the City of Reading, Pennsylvania, trading as F. Y. Kitzmiller Co., successor to Bechtelsville Hosiery Mills, of Bechtelsville, County of Berks and State of Pennsylvania, the sum of eleven thousand, five hundred fifty dollars (\$11,550) damages for breach of contract, under the following averments of facts and circumstances:

513

1. On January 24, 1918, the defendant, Frank Y. Kitzmiller, proprietor of the Bechtelsville Ho-

siery Mills of Bechtelsville, Berks County, State of Pennsylvania, entered into an agreement in writing with the plaintiffs whereby the defendant agreed to manufacture and deliver to the plaintiffs f. o. b. steamer, port of New York, 15,000 dozen pairs of women's hosiery at \$2.90 per dozen pairs to be delivered in the amounts and at the times as follows, March, April and May, 1918, shipping colors first, then white, and then black, and the plaintiffs agreed to pay for the hosiery the sum of \$2.90 per dozen pairs. A copy of the said agreement is attached hereto and made a part hereof.

515

2. The defendant, between May 18, 1918, and November 7, 1918, delivered 4,500 dozen pairs of women's hosiery under the terms and conditions of the aforesaid contract. Subsequent to November 6, 1916, the defendant, although frequently requested to do so, failed and refused to make further deliveries of hosiery under the aforesaid contract, and on July 31, 1919, rescinded the said contract by refusing to deliver the 10,500 pairs of hosiery still due the plaintiff under the terms thereof.

516

3. In reliance upon the promise of the defendant to deliver the said hosiery at the times set forth in the said contract, the plaintiffs sold the said hosiery before actual delivery thereof, under contracts for the delivery of the said hosiery by the plaintiffs at certain specified times.

4. On the date of the defendant's refusal to perform the said contract by the delivery of 10,500 dozen pairs of hosiery, the market price of hosiery

*Exhibits to Affidavit of Leon Grumet.*

517

at the same quality was \$4.00 per dozen pairs, an advance of \$1.10 per dozen pairs over the contract price.

Wherefore the plaintiffs claim of the defendant the sum of \$11,550 with interest thereon at six per cent, from July 31, 1919.

WELLINGTON M. BERTOLET  
Attorney for Plaintiffs

STATE OF NEW YORK, }  
CITY OF NEW YORK, } ss. :

518

H. S. DeRees, agent of David Costaguta, Marcos A. Algeirs, Alejandro Sassoli and Eugenio Ottolenghi, trading as David Costaguta & Company, being duly sworn deposes and says that the facts set forth in the foregoing statement of claim are correct and true to the best of his knowledge and belief.

H. S. DeREES.

Sworn to and subscribed before me this  
8th day of Sept., 1919

EDWIN C. GIBSON

519

Notary Public for

(Seal) Kings County No. 146

Certificate filed in New York County No. 21

My commission expires March 30, 1921.

520

*Exhibits to Affidavit of Leon Grumet.*

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## EXHIBIT H.

February 17th, 1920.

Messrs. Weill Feinberg Co. Inc.  
350 Broadway, Room #711,  
New York.

Gentlemen :

521 We wish to advise you that we have discounted  
our credits with the AMERICAN-EUROPEAN TRADING  
CORPORATION, temporarily at 1270 Broadway, Room  
402, New York City, to whom please take note to  
pay the bills which you owe us, detail of which  
we are giving below.

Very truly yours,

DAVID COSTAGUTA &amp; COMPANY.

(Signed) LEON GRUMET

Attorney-in-fact.

522



*Exhibits to Affidavit of Leon Grumet.*

523

Bill	February	6th, 1919	5.13	
"	"	21st, "	.65	
"	April	2nd, "	1.15	
Bill #1541	December	4th, 1919	.75	
" #1569	"	18th, "	3.25	
" # 18	January	14th, 1920	8708.20	
" # 19	"	14th, "	11730.—	
" # 17A	"	13th, "	1270.—	
" # 27	"	20th, "	990.—	
" # 28	"	" , "	452.10	
" # 29	"	" , "	594.00	
" # 30	"	" , "	1320.00	
" # 31	"	" , "	382.80	
" # 32	"	" , "	385.25	
" # 35	"	23rd, "	2893.30	
Merchandise returned, January 15th, 1920			495.00	524
			28736.58	495.00
Balance due			28241.58	
			28736.58	28736.58

525

526

*Exhibits to Affidavit of Leon Grumet.*

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## EXHIBIT I.

February 16, 1920.

Weill, Feinberg Co. Inc.  
395 Broadway,  
New York.

Gentlemen :

Referring to the various sales made to you on  
the conditions that you were to have from 10 to 30  
days to pay in, we have granted your request of  
527 another two weeks, making 45 days in all, if it  
is necessary, or as much previous to that as any-  
way possible.

Yours very truly,

DAVID COSTAGUTA &amp; COMPANY.

(Signed by) H. S. DE REES.

D : G.

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The foregoing affidavits and exhibits submitted  
in opposition to the jurisdiction of the District  
Court and the motion for Receiver and injunction,  
528 are marked filed, U. S. District Court, S. D. of  
N. Y., April 7, 1920.

**Affidavit of Anna G. Saft Submitted in 529**  
**Reply and in Support of Jurisdiction**  
**and for Receiver and Injunction.**

IN THE

DISTRICT COURT OF THE UNITED STATES,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

HENRY S. DE REES,  
 Plaintiff,

against

DAVID COSTAGUTA & COMPANY  
 and others,  
 Defendants.

530

CITY AND STATE OF NEW YORK, }  
 SOUTHERN DISTRICT OF NEW YORK, } ss.:

ANNA G. SAFT, being duly sworn, deposes and says:

I. That she resides at No. 541 Putnam Avenue, in the City of New York, Borough of Brooklyn.

II. That in or about the month of January, 1918, she was employed by Henry S. De Rees, the above-named plaintiff, as secretary and assistant book-keeper and office manager in the New York office of the business conducted there of the Hosiery Department of David Costaguta & Company, from January, 1918. to and including the 17th day of February, 1920; and also after May, 1918; when Mr. 531

Brunago came to New York as general agent of David Costaguta & Company, and the business was not confined entirely to the hosiery business; her employment was as assistant bookkeeper and office manager relative to all business transacted at that office.

III. That in such capacities the collections of bills, deposits of money and drawing of checks for payments made came directly under her observation.

IV. That during the latter part of December, 1919, or the early part of January, 1920, suits were instituted in New York City by various parties, among whom were Lunham & Moore for about \$700 for freight and insurance levied on deposits kept in the name of David Costaguta & Company in the National City Bank of New York, and by C. Munch, one Weiss and by Gaston, Williams & Wigmore, on claims to recover the moneys paid out by them respectively on contracts to purchase some 9,091 hides from David Costaguta & Company and levied the same upon said hides in New York City of the estimated value of \$150,000, and also levied upon all other assets in the business place of David Costaguta & Company at #22 White Street, New York City, as well as the bank accounts kept in the name of David Costaguta & Company in New York City.

V. That after the levy of said attachments for several weeks all monies collected on account of the hosiery department of said David Costaguta & Company were turned over to Mr. Eugenio Ottolenghi,

who deposited the same in the Trust Company of New Jersey until after, as she was informed, by said Ottolenghi, an arrangement of settlement was made with the attaching creditors to release the attachments when the amounts of their claims, as agreed upon, should be paid. That said Ottolenghi informed deponent that they did not have any money in hand to relieve said attachments and deponent was directed by him to use the telephone persistently from day to day and make every effort personally to collect all bills of the hosiery department as fast as they could be collected. That he needed the money to lift the attachments which had been levied upon the hides and other assets.

536

That during the period after said attachments were levied and before their release, she knows positively that the following collections of debts due the Hosiery Department of David Costaguta & Company were made, to wit :

A. Kommel & Son, January 5th, 1920....	\$3,293.40
A. Kommel & Son, January 6th, 1920....	10,593.31
Mendelson, Lopez & Co., January 9th,	
1920 .....	756.00
Amodo Paz & Cia, January 12, 1920....	800.00
Prieto Huos, January 13, 1920.....	365.25
A. S. Puccio & Co., January 16, 1920....	1,588.50
Mendelson, Lopez & Co., January 17, 1920	756.00
Heyman & Hawthorne, January 20, 1920.	3,156.20
Weill, Feinberg & Co., January 21, 1920..	5,245.00
Weill, Feinberg & Co., January 21, 1920..	548.60
A. Kommel & Son, January 21, 1920....	17,301.90

537

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\$44,404.16

539

Deponent handled the checks for these collections and knows that a majority of them was deposited in the Trust Company of New Jersey, and that after an informal settlement had been arranged some of them were deposited in the Guaranty Trust Company of New York and the Foreign Banking Corporation. That the attachments were levied and the Sheriff's officers withdrawn in the latter part of January, 1920, and while deponent did not see the checks which were given to pay off the attaching creditors, she was informed by said Ottolenghi that the funds which had been so deposited in the Trust Company of New Jersey, in the Guaranty Trust Company and the Foreign Banking Corporation, had been used in paying off the attachments on the said hides, and he said that it took all the funds in those banks and what the Hosiery Department had in the National City Bank to pay off said attachments.

540

VI. That among the collections made for the Hosiery Department, which were so deposited and used by said Ottolenghi and which were handled by deponent as above set forth, were certain checks of A. Kommel and Son, dated respectively January 4th, 5th, 19th and 20th, 1920, the originals of these checks having passed through the bank and are now in the possession of A. Kommel & Son of #519 Broadway, New York City, and the endorsements thereon show the places of their deposit by David Costaguta & Company, as follows: Check of January 4th, 1920, for \$3,293.40 in the Trust Company of New Jersey; check of January 5th, 1920, for

*Affidavit of Anna G. Saft.*

541

\$10953.31 in the Trust Company of New Jersey; check of January 19th, 1920, for \$12,301.90 in the Guaranty Trust Company of New York, and check of January 20th, 1920, for \$5,000 in the American Banking Corporation of New York. That deponent handled all of the above checks and knows that they were for collections for hosiery sold at the hosiery department of David Costaguta & Company.

Deponent annexed hereto, marked Exhibits "P," "Q," "R" and "S," copies of said original checks with the endorsements thereon.

ANNA G. SAFT.

542

Sworn to before me this  
31st day of March, 1920.

JACOB S. OHRMER,  
Commissioner of Deeds,  
City of New York.

Certificate filed in Kings Co., Register's No. 107.

Certificate filed in Kings Co., Clerk's No. 12.

Term expires May 11, 1920.

543

**544 Exhibits Annexed to Affidavit of Anna  
G. Saft.**

**EXHIBIT P.**

No. 2830

**A. KOMMEL & SON**  
519 Broadway

New York, Jan. 4, 1920.

Endorsement of this check  
by payee constitutes re-  
ceipt in full for the follow-  
ing account.

**545**

IF INCORRECT PLEASE RETURN.

Date—Invoice—Amount
12/15                      3293.40

Pay to the order of DAVID COSTAGUTA  
& CIA. \$3,293.40/100—Thirty-two hun-  
dred ninety-three dollars forty cents.

To

THE NATIONAL CITY BANK  
of New York.

(Signed) A. KOMMEL & SON

Endorsement: For deposit with the Trust Company  
of New Jersey and credit to the ac-  
count of David Costaguta and Com-  
pany.

**546**

Pay Chase Nat'l Bank New York  
or order.

Prior endorsement guaranteed Jan.  
5, 1920.



*Exhibits to Affidavit of Anna G. Saft.*

547

The Trust Company of N. J.  
 Peoples Safe Deposit, branch F.  
 E. Ainbruser, Vice Pres.  
 Received payment N. through New  
 York Clearing House Jan. 5.  
 Chase Nat'l Bank, New York, No. 74.

## EXHIBIT Q.

No. 2837

A. KOMMEL & SON  
 519 Broadway

548

New York, Jan. 5, 1920.

Endorsement of this check  
 by payee constitutes re-  
 ceipt in full for the follow-  
 ing account.

IF INCORRECT PLEASE RETURN.

Date—Invoice—Amount  
 12/15                      10953.31

Pay to the order of DAVID COSTAGUTA  
 & CIA. \$10953.31/100—Ten thousand  
 nine hundred fifty-three dollars thirty-  
 one cents.

549

To

THE NATIONAL CITY BANK  
 of New York.

(Signed) A. KOMMEL &amp; SON

550

*Exhibits to Affidavit of Anna G. Saft.*

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Endorsement : For deposit with the Trust Company of New Jersey and credit to the account of David Costaguta and Co. Pay Chase Natl. Bank of New York or order.

Prior endorsement guaranteed Jan. 7, 1920.

The Trust Company of New Jersey. Peoples Safe Deposit branch, F. A. Ambruster, Vice Pres.

Received Payment through New York Clearing House Jan. 7, 1920.

551

Chase Nat'l Bank, New York, No. 74.

552

## EXHIBIT R.

No. 9635

A. KOMMEL & SON  
519 Broadway

New York, Jan. 19, 1920.

This check is in full payment  
of the following bills

IF INCORRECT PLEASE RETURN.

12/17	17301.90
on a/c	5000.

554

---

 12301.90

No receipt necessary.

Pay to the order of DAVID COSTAGUTA  
& Co. \$12301.90/100—Twelve thousand  
three hundred one dollars ninety cents.

To

THE CORN EXCHANGE BANK 1-45  
Broadway Branch 3  
New York, N. Y.

(Signed) A. KOMMEL &amp; SON. ♥

Endorsement: For deposit with Guaranty Trust  
Co. to the credit of David Costaguta & Co. 555

Received payment through New  
York Clearing House Jan. 22/1920.  
Guaranty Trust Co., M—New York

T

## EXHIBIT S.

No. 9620

A. KOMMEL & SON  
519 Broadway

New York, Jan. 20, 1920.

This check is in full payment  
of the following bills

IF INCORRECT PLEASE RETURN

on account.

No receipt necessary.

557

Pay to the order of DAVID COSTAGUTA  
\$5,000.00/100—Five thousand dollars.

To

THE CORN EXCHANGE BANK 1-45  
Broadway Branch 3  
New York, N. Y.

(Signed) A. KOMMEL & SON.

Endorsement: For deposit with American Foreign  
Banking Corp. Credit to the ac-  
count of David Costaguta & Co.  
Pay to the order of Chase National  
Bank, N. Y., prior endorsement  
guaranteed American Foreign Bank-  
ing Corporation, New York, C. A.  
Mackenzie, Treas.

558

Jan. 17. Received payment through  
New York Clearing House Jan. 17,  
1920. Chase Nat'l Bank N. Y. No.  
74.

**Affidavit of Henry S. De Rees Submitted 559**  
**in Reply and in Support of Jurisdic-**  
**tion and for Receiver and In-**  
**junction.**

IN THE

DISTRICT COURT OF THE UNITED STATES,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

HENRY S. DE REES,  
 Plaintiff,

against

DAVID COSTAGUTA and others,  
 Defendants.

560

STATE OF NEW YORK, }  
 COUNTY OF NEW YORK, } ss. :

HENRY S. DE REES, being duly sworn, deposes  
 and says:

I. That your deponent has read the affidavit of  
 Leon Grumet, verified the 26th day of March, 1920,  
 interposed on behalf of the defendants, the Ameri-  
 can-European Trading Corporation and Renado Taffel, said Grumet admitting therein that he is the  
 President of said defendant American-European  
 Trading Corporation. That in reply thereto your  
 deponent avers that it is not a fact, as averred by  
 said Grumet, that your deponent only came to this 561

country with the expectation or intention of staying a month or two. That while it is true that deponent intended, if business conditions necessitated it, he would return to Buenos Aires, it was always deponent's intention to return to the City of New York as headquarters for the supply of the merchandise dealt in by the said copartnership.

That from the inception of the relations between your deponent and the said David Costaguta & Company under the contract of November 1st, 1917, it was contemplated and intended that a permanent branch place for the transaction of the business of the partnership should be established in the City of New York. That in furtherance of said purpose and intent and on the 30th day of March, 1918, your deponent, on behalf of said copartnership, opened such place of business at No. 395 Broadway, in the City of New York, Borough of Manhattan, and entered into an agreement of lease with the Equitable Life Assurance Society of the United States for one year commencing on the 1st day of May, 1918, and ending on the 1st day of May, 1919, at the rental of \$1,800 per annum, a copy of which said lease is hereto annexed and marked Exhibit "A."

II. That said Grumet in his affidavit (Par. 7) refers to certain cables and letters for the purpose of indicating that it was intended that your deponent should immediately return to Buenos Aires and refers to a cablegram dated February 13th, 1918, inquiring when your deponent would return to Buenos Aires. That on February 23rd, 1918,

*Affidavit of Henry S. De Rees.*

565

your deponent received a cablegram from Buenos Aires requesting deponent not to leave until the receipt of a letter from said Costaguta & Company, dated February 22nd, 1918, a copy of said cable being hereto annexed marked Exhibit "B."

That under date March 23rd, 1918, your deponent received another cable from said David Costaguta & Company at Buenos Aires, requesting deponent to await the arrival of one Brugnago, the person mentioned in your deponent's affidavit upon which the rule *nisi* was granted, a copy of said cable being hereto annexed marked Exhibit "C."

III. That the said Grumet avers in his said affidavit (Par. 1) that—

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"for a period of about eleven years prior to February 16th, 1920, with the exception of the fifty-eight months spent by him in the French Army, he was in the employ of David Costaguta & Company."

That, as a matter of fact, on the 1st day of November, 1917, when the contract between your deponent and said David Costaguta & Company was executed, the said Leon Grumet was not in the City of Buenos Aires, and deponent was informed by said Grumet, after the latter came to New York, that he had never been in Buenos Aires. That said Grumet had no knowledge other than hearsay of the contract entered into between your deponent and said David Costaguta & Company, or of the transactions between deponent and said firm, in respect to said contract. That said Grumet was not in the City of Buenos Aires during any of the time be-

567

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tween said 1st day of November, 1917, and the date of the arrival of said Grumet in the City of New York in the Fall of 1919. That deponent for the first time met said Grumet when the latter arrived from France in the Fall of 1919, that the said Grumet is a young man apparently about 23 to 24 years of age. That from November 1st, 1917, until the conclusion of the European War, or his demobilization from the French Army, the said Grumet was in Europe and after his demobilization he remained in France at the branch office of David Costaguta & Company in the City of Paris as a minor employee of David Costaguta & Company in France, of which Mr. Fraser was manager, as said Grumet informed your deponent, and he came to the United States directly from France, and upon his arrival here acted as an assistant to Eugenio Ottolenghi until the latter's departure for Buenos Aires, when said Grumet became the President of the American-European Trading Corporation and representative under Power of Attorney from said Ottolenghi of the firm of David Costaguta & Company of Buenos Aires.

570

That in truth and in fact it was impossible for the said Grumet to have any knowledge of many of the important facts and circumstances alleged in his affidavit, or of the intention of your deponent or the members of the firm of David Costaguta & Company, respecting the transactions between your deponent and said firm, or of the facts and circumstances alleged in your deponent's affidavit, which the said Grumet assumes to deny upon knowledge and as to the matters denied by the said Grumet upon information and belief, and the averments



which he makes upon information and belief must be predicated upon information received from others and purely hearsay, the sources of his information and the grounds of his belief not being referred to or averred in his said affidavit.

IV. That it is averred in the affidavit of said Grumet (Par. 8) that deponent, on behalf of David Costaguta & Company, instituted an action against F. Y. Kitzmuller, and that your deponent verified the complaint in said action in the following language:

"H. S. DeRees, agent of David Costaguta, Marcos A. Algiers, Alejandro Sassoli and Eugenio Ottolenghi, trading as David Costaguta & Company, being duly sworn deposes and says that the facts set forth in the foregoing statement of claim are correct and true to the best of his knowledge and belief,"

572

said action being referred to for the purpose of indicating that your deponent did not claim that he was a partner interested in the firm of David Costaguta & Company and as a declaration upon your deponent's part that he was simply an agent. That said complaint was verified by your deponent on the 8th day of September, 1919.

That at the time of the institution of said suit your deponent understood and believed, by reason of the fact that the contract for the sale and delivery of the merchandise was made and entered into by your deponent in the name of David Costaguta & Company, without the disclosure in that case to the said vendors of the fact that your deponent was a silent or dormant partner of the firm

573

of David Costaguta & Company, that it was unnecessary for your deponent to aver his relationship to the firm of David Costaguta & Company in his affidavit verifying said complaint, and that as a partner of David Costaguta & Company in and about the transaction in question he had the right as agent of the other partners to institute said suit and verify said complaint as agent.

That on the 30th day of March, 1918, and as evidence of the fact that your deponent was and considered himself to be a partner of the firm of David Costaguta & Company in said Hosiery Section, immediately after your deponent's arrival in the City of New York, and in the lease entered into between your deponent and the said Equitable Life Assurance Society of the United States on behalf of the said David Costaguta & Company, your deponent executed said lease and signed the same, as follows:

"David Costaguta & Company, H. S. De Rees, member of said firm."

That a copy of said lease so executed was deposited by your deponent with the books, papers and records of said David Costaguta & Company at its place of business in the City of New York and now remains therein, said place of business having removed from 395 Broadway to No. 22 White Street, in the City of New York, and to the best of your deponent's knowledge and belief, is now in the custody of said Leon Grumet as agent of the said David Costaguta & Company in this City, or of the American-European Trading Corporation.

That there were several other suits and legal proceedings instituted by your deponent in the United States in and about the business of said copartnership and hosiery business, in which your deponent verified legal documents and in which your deponent averred and stated that he was a member of the firm of David Costaguta & Company.

V. That on or about the 18th day of February, 1919, twenty-one numbered cases of merchandise containing hosiery, and one lot of 173½ dozen were in the premises of said David Costaguta & Company at No. 22 White Street, in the City of New York, Borough of Manhattan, as appears by a receipt signed by Leon Grumet and delivered by him to your deponent, a copy of which signed by your deponent is in the possession of said Leon Grumet, said receipt being hereto annexed marked Exhibit "D."

578

VI. That the said Grumet (Par. 11) denies that there is now in the custody of the defendant American-European Trading Corporation said twenty-one cases of merchandise or that said merchandise was transferred to it by said David Costaguta & Company, and avers that no hosiery whatever was transferred by said David Costaguta & Company to the said defendant company, or that it now owns any hosiery. He further avers that the only hosiery now owned by said David Costaguta & Company consists of "about" eleven cases located in the City of the approximate value of \$10,430, not including three cases about to be shipped to a customer in Havana when the restraining order was served.

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580

*Affidavit of Henry S. De Rees.*

581

That in truth and in fact all of said twenty-one cases are now actually in the custody and control of the said defendant company, as appears by the following: That on the 11th day of March, 1920, the day after the filing of the Bill of Complaint herein, your deponent personally served upon the Allison Storage & Transfer Co. Inc., of 74-78 Cliff Street, in the City of New York, Borough of Manhattan, a copy of said restraining order, and thereafter on the 12th day of March, 1920, the said Allison Storage & Transfer Co. Inc. wrote the following letter to Messrs. Erwin, Fried & Czaki, your deponent's solicitors herein, indicating that nine of the twenty-one cases referred to in the receipt of the said Leon Grumet, Exhibit "D" hereto annexed, were then actually held by said Allison Storage & Transfer Co. Inc. "for the account of the American-European Trading Corporation."

"Telephone 6755, 6756, 6757—Beekman

THE ALLISON STORAGE & TRANSFER CO. INC.  
74-76-78 Cliff Street  
New York

582

	Warehouses at
Warehousing of Every	457-459 Broome St.
Description	74-76-78 Cliff St.
Insurance	507-509 Washington St.
W G 1000	March 12, 1920.
Messrs. Erwin, Fried & Czaki,	
15 William St.,	
New York.	

Gentlemen:

In accordance with your request of March 10th we are listing below the merchandise we

*Affidavit of Henry S. De Rees.*

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have stored in our warehouse at 507 Washington St., for the account of the American-European Trading Corporation.

1 case	Hosiery	marked	DCC	5120	Buenos Aires	
					case #4804	
1	"	"	"	"	105	Buenos Aires
					case #592	
1	"	"	"	"	5140	Buenos Aires
					case #1025	
5	"	"	"	"	008	Montevideo
					case #5004-	
					5092-5555-	
					6924-5024	584
1	"	"	"	"	147	no other
					marks on	
					this case.	

These nine cases are stored under our numbers W-5 1418-1419-1420-1422-1423.

As we understand it we will hold these cases until advised by the court to release same.

Respectfully yours,

ALLISON STORAGE & TRANSFER CO. INC.

AG

Per A. Gradilona."

That on the 26th day of February, 1920, the American-European Trading Corporation wrote and delivered a memorandum letter to Messrs. Knight & Smith, #71 Franklin Street, a copy of which is hereto annexed marked Exhibit "E," wherein and whereby it gave directions to said Knight & Smith that the nine cases of merchandise held in the Allison Storage & Transfer Co. Inc.

585

and five additional cases, a total of fourteen in all, should be repacked for export in accordance with the instructions contained in said order and letter, Exhibit "E," hereto annexed.

587 That on the 11th day of March, 1920, your deponent personally served upon said Knight & Smith at #71 Franklin Street a certified copy of the restraining order herein, at which time there was then in the actual possession, custody and control of said Knight & Smith, for the account of the American-European Trading Corporation, five of said twenty-one cases of said merchandise, and that the said nine cases of merchandise in the possession of the Allison Storage & Transfer Co. Inc. and the five cases of merchandise in the possession of said Knight & Smith are actually held by the defendant corporation and for its account. Your deponent refers to the letter of the American-European Trading Corporation, signed by the defendant Taf-fel, dated February 28th, 1920, addressed to Messrs. Knight & Smith, as follows:

"AMERICAN-EUROPEAN TRADING CORP. to  
22 White St.  
New York

February 28th, 1920.

Messrs. Knight & Smith,  
71 Franklin St.,  
New York City.

Gentlemen:

In confirmation with our telephone conversation of to-day, referring to 9 cases of Hosiery

*Affidavit of Henry S. De Rees.*

589

## 5004-5024-5092-6294-5555-592-1025-804 & 2753 sent to you by Cross Hermanos Ltd. and delivered by the Allison Trucking Co., we shall send you besides five more cases numbered 1152-A-B-C-2432.

The total of 14 cases in your store, and as per instructions from our Mr. Grumet, given to your Mr. Smith, are to have special packing to be shipped to Buenos Aires Arg.

Our Mr. Grumet will be at your store again Monday morning and will give you personally all details that you may need regarding to the packing of the hosiery.

590

We remain yours very truly,

AMERICAN-EUROPEAN TRADING  
CORPORATION,

R. W. Tafel,  
Secrty.-Treasurer."

The original of this letter is now in the possession of deponent, received by him from Knight & Smith, and deponent knows the signatures thereon to be genuine, and he tenders same for inspection of the Court.

That on the 10th day of March, 1920, the date of the filing of the Bill of Complaint herein, your deponent accompanied the United States Marshal when he served upon said Leon Grumet and upon said defendant Taffel certified copies of said restraining order, at which time your deponent actually saw in the premises at No. 22 White Street six of said cases of merchandise referred to in said receipt of Leon Grumet, Exhibit "D" hereto an-

591

nexed, thus actually accounting for twenty of the twenty-one cases of merchandise referred to in said receipt, all of which said twenty-one cases were actually in the district on the date of the filing of the Bill and in the custody and control of the said Grumet as agent of the defendant David Costaguta & Company and as President of the American-European Trading Corporation.

VII. That the said Grumet in his affidavit (Par. 6) avers:

593

"that said department (referring to the hosiery section) in no sense constituted a separate and distinct business in the sense that it was segregated from the other or general business of said firm."

594

Deponent avers that at all times the hosiery section in which your deponent was interested was segregated and kept separate and apart from all other business of the said David Costaguta & Company, so far as the merchandise and accounts were concerned. That the stationery, books and records all indicated that the hosiery department or section in which your deponent was interested was a separate and distinct entity and business in and by itself, and the books used to record the transactions of the said business and the stationery employed in the conduct thereof so indicated upon their face. That annexed hereto, marked Exhibit "F," is a letter dated May 15th, 1918, on the letterhead used by said Department designating it as "Hosiery Department" of David Costaguta & Com-



pany. That annexed hereto, marked Exhibit "G," is a copy of a billhead rendered to Messrs. A. Kommel & Son, dated June 6th, 1919, indicating that it was rendered by the "Hosiery Department" of David Costaguta & Company.

VIII. That from the time of your deponent's arrival in the City of New York until subsequent to the month of May, 1918, all of the financial transactions of David Costaguta & Company in respect to the purchase and sale of hosiery in the United States were conducted by your deponent in the following manner: At various times during that period sums aggregating about \$150,000 were deposited by your deponent with the firm of Lunham & Moore, of New York City, including individual monies of your deponent, as well as monies received from David Costaguta & Company at Buenos Aires, which your deponent disbursed by his individual check in payment of merchandise purchased by him for said copartnership, and in which account your deponent deposited monies received by him on the sales of merchandise made by him of said copartnership. 596

That during said period the said David Costaguta & Company opened credits with the American Express Company in the City of New York aggregating between three to four hundred thousand dollars, which your deponent disbursed by orders signed in his individual name in payment of merchandise purchased by your deponent for the account of the said copartnership. 597

That during said period your deponent opened and maintained an account with the Pacific Bank

in the City of New York, in his individual name, in which, from time to time, he deposited sums aggregating from \$75,000 to \$100,000, representing monies received from Buenos Aires for the account of the copartnership, and collections which he made from merchandise which he sold for the account of the copartnership, which said monies your deponent disbursed by checks in his individual name for his individual account, as well as for the account of the said copartnership.

599

That during said period the said David Costaguta & Company opened with the National City Bank in the City of New York funds aggregating more than \$200,000, which were disbursed by said bank on orders signed by your deponent in his individual name, in payment of merchandise purchased by your deponent for the account of said copartnership.

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IX. That in the month of May, 1918, your deponent, for the purpose of relieving himself of the details of the financial arrangements theretofore conducted by him, turned over to the said Brugnago, as agent for all parties and interests, all of the funds that he then had in his possession belonging to said copartnership, and bank accounts were then opened in the City of New York with the banks mentioned in the moving affidavit of your deponent, in the name of David Costaguta & Company, in which said banks from then on the funds collected for the merchandise sold by your deponent in the United States and elsewhere were deposited in the name of the said David Costaguta & Company.

*Affidavit of Henry S. De Rees.*

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Deponent says that there is no outstanding indebtedness of the Hosiery Section or Department of David Costaguta & Company, unless it be some small amounts aggregating \$1,000 or some small liabilities for current expenses. That practically all the purchases of merchandise were made on very short term credits, allowing time for inspection after delivery in New York City.

HENRY S. DE REES.

Sworn to before me this  
31st day of March, 1920.

602

ANNA G. McCONNELL,  
Notary Public,  
Bronx Co. #1.  
Certificate filed in N. Y. Co. 58.

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**604 Exhibits Annexed to Affidavit of Henry  
S. De Rees.**

**EXHIBIT A.**

AGREEMENT, made this 30th day of March, nineteen hundred and eighteen, BETWEEN THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, by JOHN J. HALLERON, AGENT, hereinafter designated as the Landlord, and DAVID COSTAGUTA & COMPANY of Buenos Aires, Argentine, hereinafter designated as the Tenant.

**605** WITNESSETH, that the said Landlord does hereby let unto the said Tenant, and the said Tenant does hereby hire from the said Landlord,

**606** ALL that certain rooms Numbers 706-8 in the building known and designated as Number Three Hundred and Ninety-Five (395) Broadway, Borough of Manhattan, New York City, to be used and occupied for the business of Offices, and Store Room, for the term of ONE (1) YEAR to commence on the First day of May, 1918, and to end at nine o'clock in the forenoon on the First day of May, 1919, at the yearly rent of Eighteen Hundred (\$1,800.00) Dollars, lawful money of the United States, payable in equal monthly payments in advance on the first day of each and every month during the term.

The above letting is upon the following conditions, all and every one of which the said Tenant covenants and agrees to and with the said Landlord to keep and perform:

*Exhibits to Affidavit of Henry S. De Rees.*

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FIRST: This lease shall not be assigned or encumbered, and the said premises, or any part thereof, shall not be let or underlet, nor used or permitted to be used, for any purpose other than above mentioned, nor by any other person without the written consent of the said Landlord.

SECOND: The said Tenant shall take good care of the premises and fixtures, make good any injury or breakage done by such Tenant, or any agents, clerks, servants, and shall quit and surrender said premises, at the end of said term, in as good condition, as the reasonable use thereof will permit, and shall not make any alterations, additions, or improvements in said premises, or permit any additional lock or fastening on any door, without the written consent of said Landlord: and all alterations, additions or improvements, which may be made by either of the parties hereto upon the premises, except movable office furniture other than partitions, put in at the expense of the Tenant, shall be the property of the said Landlord, and shall remain upon and be surrendered with the premises, as a part thereof, at the termination of this lease, without disturbance, molestation or injury, but injury caused by moving said movable furniture in or out shall be repaired at the expense of the Tenant.

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THIRD: In case of damage by fire, or other action of the elements, to the demised premises, the Landlord shall repair the same with all reasonable despatch, after notice of the damage. But in case the building generally throughout (though the herein demised premises may not be affected) be so injured

or destroyed that the Landlord shall decide, within a reasonable time, to rebuild or reconstruct the said building, then this agreement shall cease and come to an end, and the rent be apportioned and paid up to the time of such injury or destruction, provided, however, that such damage or destruction as here-inbefore mentioned, be not caused by the carelessness, negligence, or improper conduct of the Tenant, agents or servants. No claim for compensation shall be made by the Tenant, by reason of inconvenience, damage or annoyance arising from the necessity or repairing any portion of the building, however the necessity may occur.

FOURTH: The Landlord agrees to use due diligence in operating the elevators in said building, and in furnishing steam for warming the premises between October 15th and April 15th in each year, during the hours between 8 o'clock A. M. and 6 o'clock P. M., and in furnishing a reasonable amount of artificial light by fixtures supplied during the same hours and in causing the premises to be cleaned by the janitor, Sundays and Holidays excepted; but it is expressly agreed that if the operation of the elevator, or the furnishing of steam heat, light & janitor service shall cease by reason of accident, strike, repairs, cleaning out boilers, alterations or improvements to be made or done to any part of the apparatus or appurtenances belonging thereto, or any cause, the obligations of the Tenant under the terms of this lease shall not be affected thereby, nor shall any claim accrue to the Tenant by reason thereof.

FIFTH: The Landlord shall not be liable for any damage or injury to the demised premises, or goods, wares, merchandise, or property of the Tenant or any other person contained therein, done or occasioned by or from electric wiring, plumbing, water, gas, steam or other pipes, or sewage, or the breaking of any electric wire, the bursting, leaking, or running of water from any cistern, tank, washstand, water-closet or water-pipe, sprinkler system, radiator or any other pipe, in, above, upon, or about said building or premises, or which may at any time hereafter be placed therein; or for any damage occasioned by electricity or water, snow or ice being upon or coming through the roof, skylight, trap-door, or otherwise, or for any damages or injuries to person or property arising from acts or neglect of the co-tenants or occupants of the same building, or of any owners or occupants of adjacent or contiguous property, or from any other cause whatsoever.

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SIXTH: The following RULES and REGULATIONS shall be faithfully observed and performed by the Tenant and the clerks, servants, and agents of such Tenant, to wit:

(a) The side-walk, entry, halls, passages, stair-cases and elevators shall not be obstructed, or used for any other purpose than for ingress and egress, nor shall any property of any kind be moved in or out of the building between 9 o'clock A. M. and 5 o'clock P. M.

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(b) The toilet-rooms, water-closets, urinals and other water apparatus shall not be used for any pur-

poses, other than those for which they were constructed, and no improper substance or article shall be thrown therein, nor shall any faucet be left open or any water wasted.

(c) The sashes, sash-doors, windows, glass-doors, and any skylights that reflect or admit light into the halls, or other places of said building, shall not be covered or obstructed.

(d) No one shall mark, paint, or drill into or in any way deface the walls, ceilings, partitions, floors, wood, stone or iron work; and no nails, hooks or screws shall be driven or inserted in any part of the walls or woodwork of said building.

(e) If Tenants desire telegraphic or telephone connections, the landlord will direct the electrician as to where and how the wires are to be introduced, and without such direction no boring or cutting for wires will be permitted.

(f) No sign, advertisement, notice or device, shall be inscribed, painted or affixed, on any part of the outside or inside of said building, except of such color, size and style or in such places upon or in said building, as shall be designated by said Landlord.

(g) All lettering on doors or windows shall be ordered and done by the Landlord's painter at the expense of the lessee.

(h) No machinery of any kind will be allowed to be operated on the premises without the written consent of the Landlord.



*Exhibits to Affidavit of Henry S. De Rees.*

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(i) No tenant shall do or permit anything to be done in said premises, or bring or keep anything therein, or permit anything to be brought or kept therein, which shall in any way increase the rate of fire insurance on said building, or on the property kept therein; nor use the demised premises, or any part thereof, nor suffer or permit their use to any business of such a character as to increase the rate of fire insurance on said building or on the property kept therein.

(j) The Tenant covenants and agrees not to do or permit anything to be done in or about said premises, or bring or keep anything therein, or permit anything to be brought or kept therein, which shall in any way conflict with the Orders, Ordinances, Regulations, or Rules of the State or any Department thereof, the Municipality of the City of New York, or any Department thereof, or of any public or municipal authority, or of the New York Board of Fire Underwriters, or the requirements of any policy of fire insurance upon said building, or upon any property contained therein.

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(k) The Landlord shall have power to prescribe the weight and position of iron safes, and they shall, in all cases, stand on two-inch thick strips to distribute the weight, and all damages done to the building by taking in or putting out a safe, or during the time it is in or on the premises, shall be repaired at the expense of the Tenant. Safes shall be moved only after 5 o'clock P. M., and no safe will be allowed to be moved upon the elevators, and safes

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shall only be moved by competent persons acceptable to the Landlord.

(l) The Landlord shall not be responsible to any Tenant or other person, for any loss of property from said leased premises, or damage done to furniture or effects, however occurring, whether said loss or damage occur or be done through or by any employees, or by any other person whomsoever.

(m) The Landlord shall have the right to enter any of the leased rooms, at reasonable hours in the day, to exhibit the same to applicants to hire and to put up upon them the usual notice "To Let," which said notice shall not be removed by any Tenant during the 6 months next preceding the time of expiration of the lease of the premises.

(n) Nothing shall be thrown by the Tenants, their clerks or servants, out of the windows or doors, or down the passages of the building, and Tenants shall not make or permit any improper noises in the building, or interfere in any way with other Tenants, or those having business with them. Nor shall any animals or birds be brought or kept in or about the building.

(o) The lessee shall not use the premises, nor any part thereof, nor permit the same to be used for the business of stenography, typewriting, or other copying or similar occupation, or permit any employee to carry on such business in or from the premises.

*Exhibits to Affidavit of Henry S. De Rees.*

625

(p) The use of the elevator for moving purposes is subject to the consent of the Landlord first to be obtained therefor.

(q) No illuminating oil or fluid shall be used or kept on the premises, and no stove or other heating apparatus employed in the rooms; nor shall any shades be used other than those supplied by the lessor, or awnings permitted, unless first approved by the lessor.

(r) The Landlord reserves the right to make such other rules and further rules and regulations as, in the judgment of the Landlord, may from time to time be needful for the safety and protection of the premises, and its care and cleanliness, and for the preservation of good order therein, which rules and regulations, when so made, shall have the same force and effect as if originally made a part of this lease.

626

SEVENTH: The said Tenant agrees that the said Landlord and representatives, shall have the right, during the term, to enter into and upon said premises, or any part thereof, or any part of said building, at all reasonable hours, for the purpose of inspecting the same, to see that the covenants on the part of the Tenant are being kept and performed, and of examining the same, or making such repairs, alterations, additions or improvements therein as may be necessary for the safety, preservation or improvement thereof, or which the Landlord may for any reason deem desirable. But the said Tenant shall not be entitled to any damages or rebate on

627

account of the making of any repairs, alterations, improvements or enlargements of said building, nor shall the Tenant be relieved from liability under this lease in consequence thereof.

629 EIGHTH: The Tenant having deposited with the Landlord the sum of \_\_\_\_\_ Dollars, as security for the payment of the rent and performance of the covenants herein contained on the part of the Tenant, and as an inducement to the Landlord to enter into this lease upon the terms and covenants herein contained, it is expressly understood and agreed that for special and peculiar reasons applicable to this lease, the Landlord shall be entitled to hold and retain the said deposit in the event of any breach on the part of the Tenant in respect to any of the covenants herein contained, without regard to the amount of damage suffered by the Landlord in consequence of such breach, but that if the Tenant shall carry out and perform all the covenants and agreements required to be carried out and performed by the Tenant, then at the expiration of the time herein limited for the term of this lease the said deposit shall be returned to the said Tenant.

630 NINTH: It is further agreed that, in case the said demised premises shall be deserted or vacated, or in the event of the insolvency of the Tenant, either before or after the commencement of the term, or if default shall be made in the payment of rent, or any part thereof, at the time specified herein, or if default shall be made in the performance of any of

the covenants and agreements, conditions, rules or regulations herein contained or hereafter established, as herein provided, on the part of the Tenant, this lease (if the Landlord so elect) shall become null and void thereupon, and the Landlord shall have the right to re-enter or repossess the said premises, either by force, summary proceedings, surrender or otherwise, and dispossess and remove therefrom the Tenant, or other occupants thereof, and their effects, without being liable to any prosecution therefor, and to hold the same as if this lease had not been made; and in such case, the Landlord may, at his option, re-let the premises, or any part thereof, as the agent of the Tenant, and the Tenant agrees to pay the Landlord the difference, as ascertained, from time to time, between the rents and sums hereby reserved and agreed to be paid by the Tenant and those otherwise received, on account of rents of the demised premises, during the residue of the term remaining at the time of re-entry or repossession, less all expense of re-entry, removal and reletting. The Tenant hereby expressly waives the service of notice of intention to re-enter or of instituting legal proceedings to that end.

632

TENTH: In addition to any other legal remedies, for violation, or attempted or threatened violation, by or on the part of the Tenant, or any one holding or claiming under him, of any of the covenants herein contained, the same shall, in addition to all other legal remedies, be restrainable by injunction.

633

ELEVENTH: The said Landlord covenants that the said Tenant, on paying the said yearly rent, and

performing the covenants aforesaid, shall and may peaceably and quietly have, hold and enjoy the said demised premises, for the term aforesaid.

TWELFTH: The consent of the Landlord, in any instance, to any violation of the terms of this lease, or the receipt of rent with knowledge of any breach, shall not be deemed to be a waiver as to any breach of any covenant or condition herein contained, nor shall any waiver be claimed as to any provision of this lease unless the same be in writing, signed by the Landlord or its authorized agent.

635 THIRTEENTH: This lease shall be subordinate to any mortgage or mortgages, which shall, at any time, or from time to time, be placed upon said premises, or any part thereof.

FOURTEENTH: The covenants herein contained shall bind and inure to the benefit of the parties hereto, and their legal representatives and assigns.

636 FIFTEENTH: The Tenant expressly waives all right of redemption under secs. 2256 and 2257 of the Code of Civil Procedure, and the acts amendatory thereof or supplemental thereto, relating to the redemption of real property after a warrant to dispossess shall have been issued, or after a judgment in an action of ejectment shall have been made and entered, as well as under any and all other provisions of law which may hereafter be enacted.

SIXTEENTH: And the parties hereto further mutually agree that this lease shall be taken and considered as merging and embodying within its terms any and all conversations, agreements and negotiations prior to the execution and delivery thereof.

*Exhibits to Affidavit of Henry S. De Rees.*

637

IN WITNESS WHEREOF, the parties hereto have caused these presents to be duly executed the day and year first above written.

THE EQUITABLE LIFE ASSURANCE  
SOCIETY OF THE UNITED STATES,  
By John Halleron Agent (L. S.)  
DAVID COSTAGUTA & Co.,

H. S. De Rees,  
Member of said firm. (L. S.)

In presence of:  
H. C. RENTON.

---

EXHIBIT B.

638

Feb 22 1918

J BDDE 57  
BAIRES 11

LCD DEREES NYK

BEFORE LEAVING STATES AWAIT OUR  
TODAYS LETTER

COSTAGUTA

---

EXHIBIT C.

Mar 23, 1919

L DF BDDE 130  
BAIRES 16

639

LCD DEREES NEW YORK

OUR REPRESENTATIVE BRUGNAGO  
STARTS TOMORROW FROM VALPARAISO  
VIA PANAMA PLEASE WAIT HIM

COSTAGUTA

640

*Exhibits to Affidavit of Henry S. De Rees.*

## EXHIBIT D.

	Style No.	Case No.
	93	823
	5120	804
	8	5087
	8	5092
	8	5024
	1138A	2962
	"	2932
	1183B	2961
	8	6294
641	93	1152
	5140	1025
	105	592
	75	355
	8	5004
	Vain	5555
	115	1 Cajon
	326	5022
	"	5036
	326	5093
	"	5090
	147D	2753
	105	Lot 173-1/2 Doz.
642		LEON GRUMET



## EXHIBIT E.

AMERICAN EUROPEAN TRADING CORP'N  
22 White Street,  
New York City.

New York,

February 26th, 1920.

Delivered the following goods, to be repacked  
for export:

#5004, 5024, 5092, 6294, 5555, 592, 1025, 804, 644  
2753, A.B.C. 2432, 1152, total 14 cases Hosiery.

*Repacking will be made in the following manner:*

- (a) Contents of cases #5004, 5024, 5092, 6294, of  
style 008 Children's blk. Cotton Hose, more 63  
doz. of same style actually in cases A & C, will  
be packed in *1 doz. paper package, per every  
size*, with labels outside the package showing  
the style and size.

This style, whole 540 doz. will be packed after  
in 3 export cases of 180 doz. each in the fol-  
lowing assortment:

646

*Exhibits to Affidavit of Henry S. De Rees.*

	Case #1	#2	#3		
Size 5	3	3	2		
5½	9	9	10	marks	
6	10	10	10		
6½	12	12	12		
7	15	15	14	A. E. T. C.	#1/3
7½	22	23	23		
8	25	25	25	M	
8½	30	30	29		
9	26	26	27		
9½	28	27	28	Buenos-Aires.	

647

(b) Case #4 will contain 644 doz. of style 115, Children's black & white cotton socks, actually in cases 2432 & A.

This goods are already in paper packages. Repairs only—packages in bad conditions, and put new labels in Spanish instead of English.

Marks

A. E. T. C.
M

Buenos  
Aires

and 253 Children's Cot. socks actually in cases 5555. If not, packed this 253 doz. in paper packages with labels indicating the style and size, and color.

each dozen in a paper package, and 4 dozen of same color but difference size in a bundle. Label on the bundle indicating contents (style, sizes & Color).

(c) Case #5 will contain

648

Style	75 (actually 6 B)	84	dz.
"	93	"	B 40 "
"	945	"	5555 27 "
"	9500	"	5555 54½ "

Style 75 is already in paper packages with Spanish labels.

*Exhibits to Affidavit of Henry S. De Rees.*

649

Style 93 is to be packed in one doz. packages of every size, with labels indicating style, size and color.

Style 945, if not, to be packed in one doz. package with labels indicating style, color and size.

Style 9500, to be packed same as above.

marks: #5

A. E. T. C.
M

650

Buenos Aires.

- (d) Case #6—all contents of case #592. 264 doz. Ladies Hose. If not, to be packed in one doz. package, with labels indicating size, style & Color.

Marks: #6

A. E. T. C.
M

Buenos Aires.

651

- (e) Case #7—Style 105 actually in case 1152, 173 dz. to be packed in one doz. package with labels indicating style, size and color.

652

*Exhibits to Affidavit of Henry S. De Rees.*

Marks:

#7

A. E. T. C.
M

Buenos Aires.

- (f) Case #8 Style 5140 actually in case #1025—300 dz. Ladies Hose, black, to be packed in one doz. package, with labels indicating style, size & Color.

Marks:

#8

653

A. E. T. C.
M

Buenos Aires.

- (g) Case #9—Style 5120 actually in case #804—312 doz. same packing as above # style 5140.

Marks:

#9

A. E. T. C.
M

Buenos Aires.

- 654 (h) Case 10—Style 106 Ladies Hose—Russian Calf. 162½ dz. actually in cases

#2753	100	dz.
#B	2½	"
A	27½	"
1152	32½	162½ doz.

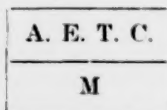
*Exhibits to Affidavit of Henry S. De Rees.*

655

to be packed in one doz. packages, with labels indicating style, size & Color.

Marks:

#10



Buenos Aires.

*Spanish labels furnished by us.*

*Good export cases, strapped & scaled. If possible, use our old cases.*

*For packages & Bundles, light but strong paper.*

*Before packing, give us the following samples:*

656

*Total*

Style 008: 1 pair size 4

1 " " 6½

2 " " 9..... 4

" 115: 1 " " 4½ white

1 " " 7 black

1 " " 5 " ..... 3

" 75: 1 " " 8½ black

1 " " 9 white

1 " " 9½ black ..... 3

" 93: 1 " " 8½

1 " " 9

1 " " 9½..... 3

657

" 3100: 1 pair Pink Size 4

1 " white " 5

1 " tan " 6

1 " asst. " 7

1 " black " 8

658

*Exhibits to Affidavit of Henry S. De Rees.*


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		1	"	blue	"	8.....	6
"	945:	1	"	of each size, black.....			3
"	9500:	1	"	of each size.....			3
"	105:	1	"	size 8, black,			
		1	"	"	8½	"	
		1	"	"	8	Cordovan	
		1	"	"	8½	"	
		1	"	"	8	white	
		1	"	"	9	mist	
		1	"	"	9½	steel grey	
		1	"	"	8½	mist	
		1	"	"	9	steel grey .....	9
659	"	5140:	1	"	of each size.....		3
	"	5120:	1	"	"	"	3
	"	106:	1	"	size 8	dark bronze,	
		1	"	"	8½	black	
		1	"	"	9	black	
		1	"	8	Russian calf,.....		4

---

44  
doz.

Before packing, take the weight *net* of each style separately, and Gross of each case.

AMERICAN EUROPEAN TRADING CORP'N.

660

## EXHIBIT F.

Codes A1: A B C 4th Edition  
 —LIEBER'S STANDARD—  
 Gallesi & Private.

## Telegramas:

DAVIDCOS—BUENOS AIRES  
 COSTAGUTA—NEW YORK.

HOSIERY DEPARTMENT OF  
 DAVID COSTAGUTA & CIA.,

of BUENOS AIRES,

NEW YORK,

662

## Importadores—Representantes.

HOME OFFICE: 395 Broadway  
 1380 Calle Alsina Tel. 1203 Franklin.  
 Buenos Aires.

PARIS—MILAN.  
 Montevideo—Valparaiso,  
 Asuncion.

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664 *Exhibits to Affidavit of Henry S. De Rees.*

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**EXHIBIT G.**

Codes A1: A B C 4th Edition  
—LIEBER'S STANDARD—  
Gallesi & Private.

Telegramas:

**DAVIDCOS—BUENOS AIRES**  
**COSTAGUTA—NEW YORK.**

Bill No. 1167

**HOSIERY DEPARTMENT OF**  
**DAVID COSTAGUTA & CIA.,**  
of Buenos Aires.

**REMOVED**  
**TO**

665 Importadores—Representantos

22-24 White St.

**HOME OFFICE:**  
1380 Calle Alsina  
Buenos Aires

**NEW YORK,**  
June 6, 1919.  
Tel 430 Canal.

**PARIS—MILAN**  
**Montevideo—Valparaiso**  
Asuncion

**Messrs. A. Kommel & Sons,**  
519 Broadway,  
New York City.

**To DAVID COSTAGUTA & CIA., Dr.**

**Terms: Net Cash, no discount.**

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666

The foregoing affidavits and exhibits submitted in reply on the hearing for Receiver and injunction and in support thereof and in support of the jurisdiction of the District Court, are marked filed U. S. District Court, S. D. of N. Y., April 7, 1920.



**Opinion.**

667

**UNITED STATES DISTRICT COURT.****SOUTHERN DISTRICT OF NEW YORK.****HENRY S. DEREEs**

against

**DAVID COSTAGUTA, MARCOS A. ALGIER, ALEJANDRO SASSOLI, EUGENIO OTTOLENGHI,** individually and as copartners in business composing the copartnership of David Costaguta & Company, Renado Taffell and the American-European Trading Corporation.

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**FREDERICK M. CZAKI** for the Plaintiff.**WALTER H. MERRITT**, Appearing specially for David Costaguta & Company.**J. ARD HAUGHWOUT** for American-European Trading Corporation.**MOTION FOR A RECEIVER AND AN INJUNCTION.**

**LEARNED HAND, D. J.:** This is not a case where the articles do not contain any provision as to who shall conduct the liquidation; Article Ten provides for dissolution by three months' notice and Articles Eleven and Twelve for the methods of liquidation. Under Article Eleven, if either party demand it, as DeRees did, the merchandise must be "liquidated,"

669

*Opinion.*

670

*i. e.*, sold, and David Costaguta & Company must pay him his share when ascertained, with interest, in four installments. He must himself "give his co-operation up to the moment the liquidation be terminated."

671

The first question is whether during the liquidation period DeRees should have a joint possession with David Costaguta & Company. I do not think that this can be determined by considering at what time David Costaguta & Company became "sole owners" of the "business," though on the whole it seems most probable that that was immediately on dissolution and not at the completion of liquidation. They might, however, become owners only at the later period and still have the right to possession meanwhile. My reason for thinking that they did have immediate possession is that both Articles Eleven and Twelve show that they were eventually in any case to get the whole "business," and that in so far as the business involved anything but "merchandise" in the nature of things, they became owners at once. This is because they were not to divide the surplus with DeRees in specie, but under both articles it was to be treated as theirs, and they became indebted to him for his final share, payable in installments with interest. That effectively precludes any division. Now as they were not to divide the proceeds it would be an unexpected purpose which should contemplate his having joint possession of merchandise pending its sale, whose proceeds he was not to share. Moreover, under Article Twelve, David Costaguta & Company were to have ownership and possession at once; yet the only difference between the two articles is that under Ar-

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ticle Twelve the merchandise was to be taken at its book value, while under Article Eleven it was to be sold. I do not readily perceive why that single difference should have given DeRees an intermediate joint possession until the value was ascertained in this alternative way. The argument drawn from the phrase, "common accord," is not valid; it refers only to the striking of an account between the parties.

Moreover, I regard the phrase that DeRees should lend "his coöperation" as putting the question beyond any doubt. It is not appropriate language to describe joint possession, but rather that DeRees, notwithstanding that the firm was charged with the duty to liquidate, was himself bound to help actively. Finally it is to be noted that for over three months DeRees allowed the firm to conduct the liquidation without any protest, a pretty convincing indication that he supposed it was their right. I think for these reasons that, regardless of when David Costaguta & Company were to become sole owners, they were at the least liquidating partners and entitled to sole possession, assuming that there was any partnership at all, which I doubt. If so, DeRees must show some reason why a court should take out of their hands the possession so granted, *Meyer v. Reimers*, 30 Misc., 307, 49 App. Div., 638; *Hoffman v. Hauptner*, 135 App. Div., 148, and substitute a receiver who shall hold the assets against the final settlement of the accounts whether here or in Argentina, *Chesley v. Morton*, 9 App. Div., 461. There must be some abuse of trust to secure such relief, for normally it would be the right of David Costaguta & Company to sell the merchandise wher-

674

675

ever it is, withdraw the proceeds to Argentina and there to state the account. Nor is it any reason to suggest that this will compel DeRees to go to Argentina if he would challenge the account, or get any other relief. That is precisely the jurisdiction in which the parties should adjust their grievances if they have any. The contract was there made, most of it was there to be performed, and the parties were all in business there when it was made. Certainly, I shall assume that the Argentine courts are as competent and impartial for that purpose as our own.

677

There are but two such grounds suggested which might justify the interposition of this court, (1) the mingling of funds by David Costaguta & Company, (2) the fraudulent transfer of firm assets. There is no suggestion anywhere in the contract that the funds of the Hosiery Section must at any time be kept separate from the general assets of David Costaguta & Company; as it was a branch of the business of David Costaguta & Company there was every reason for them not to do so. The opposing affidavits assert that the practice of commingling funds had been uniformly followed from the outset, and Article Seven clearly shows that the cash was to be kept not by the supposititious firm, but by David Costaguta & Company alone. If so,

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it would be quite gratuitous to suppose that they must keep it in separate accounts, and whatever may have been the proper practice before dissolution, upon dissolution David Costaguta & Company became, prospectively in any event, "the sole owners of the business," and their right was absolute to mingle the assets with their own. They were ac-

countable, of course, to DeRees, but he had no lien upon the assets which was not to terminate, if it existed at all, as soon as all the merchandise was sold.

As to the fraudulent conveyance, the reasons just given are answer enough, but I prefer to consider the merits, as it involves so serious a charge. The bare allegation of fraud will not serve; there must be some evidence. The firm had experienced irritating annoyances in having the status of a non-resident, and the organization of a domestic corporation was a perfectly legitimate way out. The substance of the ownership remained quite as before, but the assets were protected from attachments which had in the past caused waste. They were or soon would be the owners, and could never be called upon to turn over to DeRees any part of the assets in kind. Why it should be thought, therefore, a fraud for an entirely solvent grantor to turn such assets to a corporation in which it owned all the stock I cannot conceive. As matter of law it would not have been such even if they had been insolvent, *Re Braue*, 248 Fed. R., 55; as a matter of intent, there is not the slightest ground for saying so, except DeRees's personal opinion.

680

The motion for a receiver and an injunction is denied.

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#### MOTION TO DISMISS THE SERVICE AND VACATE THE ORDER FOR SUBSTITUTED SERVICE.

This question must be decided upon the bill alone, and is, whether DeRees may proceed under Section Fifty-seven of the Judicial Code upon al-

683

legations that pending liquidation David Costaguta & Company has fraudulently conveyed a part of the partnership assets to avoid DeRees's lien. That a partner has usually no rights except a bill for an accounting, pending the partnership, scarcely needs any show of citation. I must take it, however, upon this motion that, pending liquidation, the liquidating partner, for the purpose of defrauding the plaintiff, has transferred the firm assets to another. If so, the plaintiff has lost his rights *in rem* and is relegated to an action against the firm of David Costaguta & Company. If the liquidation included turning over to the plaintiff his share of the assets when converted into cash, I should agree that his lien, as it is generally called, entitled him to protection of those assets in the hands of the liquidator, and that he could by a suit under Section Fifty-Seven of the Judicial Code, follow the assets and insist upon their sequestration by a court, not of course for delivery to him, but at least to await the statement of the accounts and distribution in accordance therewith. No partner should be compelled in the face of such an effort to trust to the continued solvency of the liquidating partner; *Holmes v. Gilman*, 138 N. Y., 369; the right would be clear against the grantee and the grantors might be brought in by substituted service to conclude their rights in the fund.

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However, this contract, always assuming it to create a partnership, is not of the usual kind. It permits the liquidating partner, as I have said, to take over all the assets as sole owner and to pay his share to the other partner in installments, with interest. In so providing I think that the partner's

rights *in rem* were changed and that, in the absence of insolvency, the transfer could not be a fraudulent conveyance. The liquidating partner might deal as he pleased with his own so long as the transfer left him solvent. The allegations in the bill that the purpose of the transfer was to prevent the plaintiff from recovering his share, must therefore yield, since it appears that they are necessarily without basis.

Now it is quite true that under the contract as pleaded in the bill, David Costaguta & Company are not to become the sole owners of the business until the liquidation is completed, and possibly this is true under the contract itself. But I think that it makes no difference for this purpose whether they were to take over the business at dissolution or at the completion of the liquidation. In no event could the plaintiff ever receive any share in the assets as such, for in either case he is confined to his rights *in personam* against the firm upon their undertaking to pay in installments his share as eventually settled by liquidation. The only excuse for allowing him to proceed *in rem* would be his right to insist at some time upon the application of this particular property to that payment at some future time, a right which at no time can he possess. I am of course aware that this disposition would end the case in this jurisdiction, but that is precisely the result which I think should follow. There seems to me to be no excuse for compelling these defendants to litigate here what should be settled in Argentina, or for impeding them in the settlement, which is progressing, so far as I can see, quite in accordance with their agreement.

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*Opinion.*

Motion to vacate service and order of service granted.

L. H.,  
D. J.

Marked filed April 7, 1920.

**Objections and Exceptions to Proposed Decrees.**

IN THE

DISTRICT COURT OF THE UNITED STATES,

689

FOR THE SOUTHERN DISTRICT OF NEW YORK.

HENRY S. DE REES,  
Plaintiff,

against

DAVID COSTAGUTA, MARCOS A.  
ALGIERS, ALEJANDRO SASSOLI,  
EUGENIO OTTOLENGHI, indi-  
vidually and as copartners in  
business composing the copart-  
nership of David Costaguta &  
Company, Renado Taffell and  
the American-European Trad-  
ing Corporation,

Defendants.

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AND NOW comes the plaintiff by Messrs. Erwin,  
Fried & Czaki, his solicitors, and shows to the Court



that on the 8th day of April, 1920, there was served upon his solicitors by Walter H. Merritt, Esq., representing the non-resident defendants, a notice of motion to settle the decree of the Court on the opinion rendered and filed by the Court on April 7th, 1920, in so far as it affects said non-resident defendants, and to which said notice he attached the form of his proposed decree, a copy of which is hereto attached, marked "A"; and that on the said 8th day of April, 1920, there was served upon plaintiff's said solicitors by Messrs. Esselstyn & Haughwout, representing the resident defendants herein, a notice of motion to settle the decree on the said opinion of the Court, so far as it affects the said resident defendants, and to which said notice they attached the form of their proposed decree, a copy of which is hereto attached, marked "B."

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AND thereupon and before the settlement of said decrees by the Court comes now the plaintiff, by his said solicitors of record, and objects to the forms and to the substance of said decrees so proposed by said respective solicitors for said respective defendants drafted upon the opinion of the Court, on the following grounds:

(1) That said proposed decrees, in so far as they vacate and annul the service of subpoena on the resident defendants, and in so far as they vacate and annul the order of the Court of March 16th, 1920, for service on the non-resident defendants by publication and the service of said order upon the persons in possession of the property in the district sought to be subjected to plaintiff's claim set

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forth in the Bill, deprive the plaintiff of a property right without due process of law, in violation of the Constitution and laws of the United States.

(2) That the said decrees in the same respect unlawfully deprive the plaintiff of his constitutional right to invoke the jurisdiction of this Court in the controversy in this cause by the methods and processes provided by law whereby he is entitled to invoke and make the jurisdiction of the Court effective by such processes and means, as will protect his property rights, as well as his rights as a citizen of the United States to litigate said claim in this Court.

(3) That the said decrees by the dismissal of plaintiff's Bill at this stage of the proceedings, and where the defendants have only entered their appearances specially to the jurisdiction, and before the plaintiff under the rules of practice and procedure, had an opportunity to obtain evidence under subpoena and regular processes and to produce evidence and meet evidence under examination and cross-examination, deprive the plaintiff of that due process of law secured to him by the Constitution of the United States and of the means to enforce a property right by due process of law in a Court of the United States having jurisdiction of the subject-matter and of the parties.

(4) That the said decrees by vacating and declaring null and void the service of subpoena on the resident defendants, and the order for service by publication on the non-resident defendants, and of

*Objections and Exceptions.*

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notice thereof to persons in possession of the property in the district on which plaintiff, in his Bill, asserts a claim or lien, deprive the Court of the exercise of the jurisdiction of the person and of the subject-matter in this cause which it should lawfully exercise, and deprive the plaintiff of his lawful right to have the Court exercise that jurisdiction.

(5) That the said decrees make the Court dismiss the bill at a stage of the proceedings at which it could not be lawfully dismissed without stating the reason for the dismissal, such as want of jurisdiction or other cause sufficient to deprive the plaintiff of his day in Court. 698

(6) That the said decrees so proposed deprive the plaintiff of his right to have the property, a claim or right to or lien upon which he asserts in his Bill conserved and protected by this Court and by the Circuit Court of Appeals by such interlocutory orders of injunction or Receiver or other protective order usual to Courts of equity, and to have a review of such orders as are made, under the statutes providing for review on appeal of interlocutory orders by the Court of Appeals, at and prior to the disposition of the cause, and this Court is without lawful power to so dispose of the cause. 699

(7) WHEREFORE, plaintiff respectfully objects to the said proposed forms of decrees, or to any decree which violates his rights as he conceives them to be in the particulars above set forth, and without waiver of any right of objection he may

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*Objections and Exceptions.*

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have on other grounds, or of the failure of the Court to give the relief prayed for by him.

Dated, New York, April 10th, 1920.

ERWIN, FRIED & CZAKI,  
Solicitors for plaintiff,  
15 William Street,  
New York City,  
Borough of Manhattan.

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*Objections and Exceptions.*

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"A."

At a Stated Term of the United States District Court for the hearing of Motions, held in the United States Post Office Building, in the Borough of Manhattan, City of New York, on the day of April, 1920.

Present :

HON. LEARNED HAND,  
*Justice.*

704

HENRY S. DE REES,  
Plaintiff,

against

DAVID COSTAGUTA, MARCOS A.  
ALGIERS, ALEJANDRO SASSOLI,  
EUGENIO OTTOLENGHI, indi-  
vidually and as copartners in  
business composing the copart-  
nership of David Costaguta &  
Company, Renado Taffell and  
the American-European Trad-  
ing Corporation,

Defendants.

Order  
Equity 17-201

705

The order to show cause, made by the Hon. Learned Hand, United States District Judge, dated the 23rd day of March, 1920, directing the plaintiff to show cause why an order should not be made va-

*Objections and Exceptions.*

707

eating and setting aside the order made by said Hon. Learned Hand, dated the 16th day of March, 1920, directing that substituted service of the subpoena be made on the defendants David Costaguta, Marcos A. Algiers, Alejandro Sassoli, Eugenio Ottolenghi, individually and as copartners in business composing the copartnership of David Costaguta & Company, in the manner therein provided and to have declared null and void certain alleged services of the subpoena on said defendants, certified by Thomas D. McCarthy, United States Marshal, to have been made by him, came on to be heard at this term and was argued by counsel, said defendants having appeared specially for the purposes therein stated, and thereupon, upon consideration thereof, it was

ORDERED, ADJUDGED AND DECREED that the said order made by the Hon. Learned Hand, United States District Judge, dated the 16th day of March, 1920, be and the same is hereby vacated, quashed and set aside in all respects, and all acts done thereunder either by the plaintiff or by said Thomas D. McCarthy, United States Marshal, be and the same hereby are declared null and void; and it is

708

FURTHER ORDERED, ADJUDGED AND DECREED, that the alleged service of the subpoena certified by Thomas D. McCarthy, United States Marshall, in and by his certain certificate dated the 11th day of March, 1920, to have been made by him "upon the within defendant and David Costaguta Co.," in the manner therein stated, be and the same hereby is declared null and void and of no effect; and it is

*Objections and Exceptions.*

709

FURTHER ORDERED, ADJUDGED AND DECREED, that the bill of complaint herein be and the same hereby is dismissed as to the defendants David Costaguta, Marcos A. Algiers, Alejandro Sassoli and Eugenio Ottolenghi, individually and as copartners in business composing the copartnership of David Costaguta & Company.

Enter,

*U. S. D. J.*

710

711

712

*Objections and Exceptions.*

"B."

At a Stated Term of the United States District Court for the hearing of motions, held in the United States Post Office Building, in the Borough of Manhattan, City of New York, on the day of April, 1920.

Present:

Hon. LEARNED HAND,  
*Justice.*

713

HENRY S. DE REES,  
Plaintiff,

against

DAVID COSTAGUTA, MARCOS A.  
ALGIERS, ALEJANDRO SASSOLI,  
EUGENIO OTTOLENGHI, indi-  
vidually and as copartners in  
business composing the copart-  
nership of David Costaguta &  
Company, Renado Taffell and  
the American-European Trad-  
ing Corporation,

Order  
Equity 17-201

714

Defendants.

The order to show cause, made by the Hon. Learned Hand, United States District Judge, dated the 13th day of March, 1920, and obtained by the



*Objections and Exceptions.*

715

plaintiff herein, directing the defendants to show cause why an order should not be made appointing a Receiver *pendente lite* and granting an injunction during the pendency of this action, and for the other relief prayed for therein, came on to be heard at this term and was argued by counsel and thereupon, upon consideration thereof, it was

ORDERED, ADJUDGED AND DECREED that the motion made by the plaintiff, in and by said order to show cause, be and the same hereby is denied in all respects; and it is

FURTHER ORDERED, ADJUDGED AND DECREED, that the temporary restraining order contained in said order to show cause be and the same hereby is vacated, annulled and cancelled in all respects; and it is

FURTHER ORDERED, ADJUDGED AND DECREED, that the bill of complaint herein be and the same hereby is dismissed.

Enter,

*U. S. D. J.*

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Service of the foregoing objections is admitted April 10, 1920, by Walter H. Merritt, Esq., and Messrs. Esselstyn & Haughwout, the attorneys for all of the defendants appearing specially on April 10, 1920, and are marked filed U. S. District Court, S. D. of N. Y., April 10, 1920.

718

**Notice of Settlement of Proposed  
Decree.**

IN THE  
DISTRICT COURT OF THE UNITED STATES,  
FOR THE SOUTHERN DISTRICT OF NEW YORK.

HENRY S. DE REES,  
Plaintiff,

vs.

DAVID COSTAGUTA *et al.*,  
Defendants.

Notice of  
Settlement  
Equity 17-201

719

*Sirs:*

PLEASE TAKE NOTICE, that the annexed order will be presented for settlement to the Hon. Learned Hand, United States District Judge, at the office of the Clerk of this Court, in the Post Office Building, in the Borough of Manhattan, City of New York, on the 9th day of April, 1920, at 9:30 in the forenoon.

Dated, New York, April 8, 1920.

ESSELSTYN & HAUGHWOUT,  
Proctors for Defendants Renado Taffell  
and American-European Trading Corp.,  
2 Rector Street,  
Borough of Manhattan,  
New York City.

720

To:  
ERWIN, FRIED & CZAKI, Esqs.,  
Proctors for plaintiff,  
15 William Street,  
New York City.

**Final Decree.**

721

At a Stated Term of the United States District Court for the Hearing of Motions, held in the United States Post Office Building, in the Borough of Manhattan, City of New York, on the 10th day of April, 1920.

Present :

HON. LEARNED HAND,  
*Justice.*

HENRY S. DE REES,  
Plaintiff,

against

DAVID COSTAGUTA, MARCOS A. ALGIERS, ALEJANDRO SASSOLI, EUGENIO OTTOLENGHI, individually and as copartners in business composing the copartnership of David Costaguta & Company, Renado Taffell and the American-European Trading Corporation,  
Defendants.

722

Order  
Equity 17-201

The order to show cause, made by the Hon. Learned Hand, United States District Judge, dated the 13th day of March, 1920, and obtained by the plaintiff herein, directing the defendants to show cause why an order should not be made appointing a receiver *pendente lite* and granting an injunction

723

during the pendency of this action, and for the other relief prayed for therein, came on to be heard at this term and was argued by counsel and thereupon, upon consideration thereof, it was

ORDERED, ADJUDGED AND DECREED, that the motion made by the plaintiff, in and by said order to show cause, be and the same hereby is denied in all respects; and it is

FURTHER ORDERED, ADJUDGED AND DECREED, that the temporary restraining order contained in said order to show cause be and the same hereby is vacated, annulled and cancelled in all respects; and it is

FURTHER ORDERED, ADJUDGED AND DECREED, that the bill of complaint herein be and the same hereby is dismissed.

LEARNED HAND,

*U. S. D. J.*

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The foregoing decree is marked filed U. S. District Court, S. D. of N. Y., April 10, 1920.

**Notice of Settlement of Proposed  
Decree.**

727

IN THE  
DISTRICT COURT OF THE UNITED STATES  
FOR THE SOUTHERN DISTRICT OF NEW YORK.

HENRY S. DE REES,  
Plaintiff,

vs.

DAVID COSTAGUTA *et al.*,  
Defendants.

Notice of  
Settlement  
Equity 17-201

728

*Sirs:*

PLEASE TAKE NOTICE, that the annexed order will be presented for settlement to the Hon. Learned Hand, United States District Judge, at the office of the Clerk of this Court, in the Post Office Building, in the Borough of Manhattan, City of New York, on the 9th day of April, 1920, at 9:30 in the forenoon.

Dated, New York, April 8, 1920.

WALTER H. MERRITT,  
Appearing specially herein for defend-  
ants David Costaguta, Marcos A.  
Algiers, Alejandro Sassoli, and Eu-  
genio Ottolenghi, individually and  
as copartners in business, etc.,

729

54 Wall Street,  
Borough of Manhattan,  
New York City.

730 To:  
 ERWIN, FRIED & CZAKI, Esqs.,  
 Proctors for plaintiff,  
 15 William Street,  
 New York City.

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**Final Decree.**

At a Stated Term of the United States District Court for the Hearing of Motions, held in the United States Post Office Building, in the Borough of Manhattan, City of New York, on the 10 day of April, 1920.

Present:

731 HON. LEARNED HAND,  
*Justice.*

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HENRY S. DE REES,  
 Plaintiff,

against

DAVID COSTAGUTA, MARCOS A.  
 ALGIERS, ALEJANDRO SASSOLI,  
 EUGENIO OTTOLENGHI, indi-  
 vidualy and as copartners in  
 business composing the copart-  
 nership of David Costaguta &  
 Company, Renado Taffell and  
 the American-European Trad-  
 ing Corporation,  
 Defendants.

Order  
 Equity 17-201

732

---

The order to show cause, made by the Hon. Learned Hand, United States District Judge, dated

the 23rd day of March, 1920, directing the plaintiff to show cause why an order should not be made vacating and setting aside the order made by said Hon. Learned Hand, dated the 16th day of March, 1920, directing that substituted service of the subpoena be made on the defendants David Costaguta, Marcos A. Algiers, Alejandro Samsoli, Eugenio Ottolenghi, individually and as co-owners in business composing the copartnership of David Costaguta & Company, in the manner therein provided and to have declared null and void certain alleged services of the subpoena on said defendants, certified by Thomas D. McCarthy, United States Marshal, to have been made by him, came on to be heard at this term and was argued by counsel, said defendants having appeared specially for the purposes therein stated, and thereupon, upon consideration thereof, it was

734

ORDERED, ADJUDGED AND DECREED that the said order made by the Hon. Learned Hand, United States District Judge, dated the 16th day of March, 1920, be and the same is hereby vacated, quashed and set aside in all respects, and all acts done thereunder either by the plaintiff or by said Thomas D. McCarthy, United States Marshal, be and the same hereby are declared null and void; and it is

735

FURTHER ORDERED, ADJUDGED AND DECREED, that the alleged service of the subpoena certified by Thomas D. McCarthy, United States Marshal, in and by his certain certificate dated the 11th day of March, 1920, to have been made by him "upon the within defendant and David Costaguta Co.," in the

736

*Final Decree.*

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manner therein stated, be and the same hereby is declared null and void and of no effect; and it is

FURTHER ORDERED, ADJUDGED AND DECREED, that the bill of complaint herein be and the same hereby is dismissed as to the defendants David Costaguta, Marcos A. Algiers, Alejandro Sassoli and Eugenio Ottolenghi, individually and as copartners in business composing the copartnership of David Costaguta & Company.

LEARNED HAND,

U. S. D. J.

737

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The foregoing decree is marked filed U. S. District Court, S. D. of N. Y., April 10, 1920.

738



**Order Allowing Appeal.**

739

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

HENRY S. DE REES,  
Plaintiff-Appellant,  
against

DAVID COSTAGUTA, MARCOS A.  
ALGIERS, ALEJANDRO SASSOLI,  
EUGENIO OTTOLENGHI, indi-  
vidually and as copartners in  
business composing the copart-  
nership of David Costaguta &  
Company, Renado Taffell and  
the American-European Trad-  
ing Corporation,  
Defendants-Appellees.

E 17-201

740

The foregoing petition for appeal is hereby granted, and the claim of appeal as therein made is allowed upon the ground that the Bill of Complaint was dismissed for want of jurisdiction and that this Court, on the Bill, has no jurisdiction of the subject-matter and of the persons mentioned therein, and it is ordered that the appeal to the Supreme Court from the final decrees entered in the above entitled cause on the 10th day of April, 1920, be, and the same is allowed, and that a transcript of

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*Order Allowing Appeal.*

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the record, bill, appearances, affidavits and exhibits, orders, decrees, proceedings and papers, and opinion of the Court, upon which said decrees were made, duly authenticated, be sent to the Supreme Court.

Dated, New York, April 10th, 1920.

LEARNED HAND,  
*District Judge.*

743

744

**Petition for Order Allowing Appeal.** 745

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

HENRY S. DE REES,  
Plaintiff-Appellant,  
against

DAVID COSTAGUTA, MARCOS A.  
ALGIERS, ALEJANDRO SASSOLI,  
EUGENIO OTTOLENGHI, indi-  
vidually and as copartners in  
business composing the copart-  
nership of David Costaguta &  
Company, Renad6 Taffell and  
the American-European Trad-  
ing Corporation,  
Defendants-Appellees.

E 17-201

746

*To the Honorable, the Judges of the District Court  
of the United States, for the Southern District  
of New York:*

The above named appellant, conceiving himself aggrieved by the final decrees made and entered in the above entitled cause under date of the 10th day of April, 1920, wherein and whereby, among other things, the Bill of Complaint herein is dismissed, and it is ordered, adjudged and decreed as in said decrees is more fully set forth, doth hereby appeal to the Supreme Court of the United States, and he files herewith his assignment of errors and peti-

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tions this Court for an order allowing him to prosecute an appeal as against all of said defendants from said decrees direct to the Supreme Court under and according to the laws of the United States, in that behalf made and provided, upon the grounds and for the reasons that the appellant claims that he has been deprived of his rights under the constitution of the United States, as more particularly specified in said assignments of error and because the District Court of the United States for the Southern District of New York has refused to entertain jurisdiction of the Bill of Complaint and dismissed the same for alleged lack of jurisdiction of the subject-matter and of the parties defendant named in said Bill, and that a transcript of the record, bill, appearances, affidavits, exhibits, orders, opinion and decrees, proceedings and papers upon which said decrees were made, duly authenticated, may be sent to the Supreme Court.

Dated, New York, April 10th, 1920.

ERWIN, FRIED & CZAKI,

Solicitors for appellant,

Office and Post Office Address,

15 William Street,

New York City.

750

The foregoing petition for and order allowing appeal are marked filed United States District Court, Southern District of New York, April 10, 1920, and service of copies thereof is admitted by Messrs. Es-selstyn & Haughwout, and Walter H. Merritt, Esq., April 10, 1920, as attorneys for all of the defendants appearing specially.

**Certificate of District Judge.**

751

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

HENRY S. DE REES,  
Plaintiff,

against

DAVID COSTAGUTA, MARCOS A.  
ALGIERS, ALEJANDRO SASSOLI,  
EUGENIO OTTOLENGHI, indi-  
vidually and as copartners in  
business composing the copart-  
nership of David Costaguta &  
Company, Renado Taffell and  
the American-European Trad-  
ing Corporation,  
Defendants.

E 17-201

752

The plaintiff having entered his appeal to the Supreme Court from the decrees of this Court entered the 10th day of April, 1920, vacating the order for service by publication on the non-resident defendants, and the service of subpoena on all the defendants, and dismissing plaintiff's bill as more particularly set forth in said decrees,

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I HEREBY CERTIFY that said decrees were entered solely because the case as made by the bill did not set forth a legal or equitable claim to or lien on

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*Certificate of District Judge.*

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the property in the district, of which this Court would have jurisdiction within the meaning of Section 57 of the Judicial Code, or in which this Court could render a judgment otherwise than a judgment *in personam* against the non-resident aliens who appeared specially and objected to the jurisdiction of the Court.

Dated, New York, April 10th, 1920.

LEARNED HAND,  
*District Judge of the United States,  
for the Southern District of New  
York.*

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755

Service of the foregoing certificate on Messrs. Es-selstyn & Haughwout and Walter H. Merritt, Esq., attorneys for all of the defendants appearing specially, is admitted April 10, 1920, and said certificate is marked filed United States District Court, Southern District of New York, April 10, 1920.

756

**Assignments of Error.**

757

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

HENRY S. DE REES,  
Plaintiff-Appellant,  
against

DAVID COSTAGUTA, MARCOS A.  
ALGIERS, ALEJANDRO SASSOLI,  
EUGENIO OTTOLENGHI, indi-  
vidually and as copartners in  
business composing the copart-  
nership of David Costaguta &  
Company, Renado Taffell and  
the American-European Trad-  
ing Corporation,  
Defendants-Appellees.

E 17-201

758

AND NOW comes the plaintiff, the appellant here-  
in, and files the following assignments of error upon  
which he will rely in the prosecution of the appeal  
in the above entitled cause from the decrees entered  
herein on the 10th day of April, 1920, and avers  
that the United States District Court erred, in and  
by said decrees:

759

**FIRST.**

In holding that the plaintiff-appellant in and by  
his Bill of Complaint failed to assert a legal or

equitable title, or claim to or lien upon property in the district of which the Court had jurisdiction.

#### SECOND.

In holding that the claim asserted in plaintiff's said bill was an action which could only be enforced by an action *in personam* against the defendants, and could not be enforced against property of the copartnership in the district, known as the "Hosiery Department" of David Costaguta & Company, of which the plaintiff was a copartner, by service by publication under Section 57 of the Judiciary Code.

#### THIRD.

In vacating the service of the order of March 16, 1920, for service by publication upon the non-resident defendants, and declaring null and void everything done under it.

#### FOURTH.

In vacating the service of the said order of March 16, 1920, upon the resident defendants as persons in possession of the property in the District in and on which plaintiff asserted a claim and lien in his bill, and in vacating the entry of service of the subpoena upon said resident defendants.

#### FIFTH.

In and by vacating the order for service by publication as to the non-resident defendants, and vacating service of subpoena on the resident defendants, depriving the plaintiff of the processes of the



*Assignments of Error.*

763

Court by which he could assert and protect his property rights in the district, and assert his constitutional right to invoke and have exercised the jurisdiction of this Court having jurisdiction of the subject matter and of the controversy, and thus depriving plaintiff of the property rights asserted in said bill without due process of law.

## SIXTH.

In and by the dismissal of the bill as to the non-resident defendants for want of jurisdiction.

## SEVENTH.

764

In and by the dismissal of the bill as to the non-resident defendants for alleged failure to set forth a cause of action.

## EIGHTH.

In and by the dismissal of the bill as to the resident defendants for want of jurisdiction.

## NINTH.

In and by dismissing the bill as to the resident defendants for want of alleged failure to set forth a cause of action.

## TENTH.

765

In and by the dismissal of the bill as to the resident defendants because the non-resident defendants were indispensable parties.

## ELEVENTH.

In and by the dismissal of the bill on hearing on special appearance of the non-resident defendants before the time fixed by the order for publication for the non-resident defendants to appear, plead, answer or demur to the bill, and before it could be known that said defendants would not voluntarily appear, plead, answer or demur.

## TWELFTH.

767 In and by the dismissal of the bill as to the resident defendants on affidavits submitted by them going to the merits of the cause of action, on a special appearance of said defendants limited to the question of jurisdiction.

## THIRTEENTH.

768 In that it deprives the plaintiff of his right to have the property, a claim or right to or lien upon which he asserts in his bill, conserved and protected by this Court or by the Circuit Court of Appeals by such interlocutory orders of injunction or Receiver, or other protective order usual to Courts of equity, and to have a review of such orders as are made, under the statutes providing for review on appeal of interlocutory orders by the Court of Appeals, at and prior to the disposition of the cause, and said District Court is without lawful power to so dispose of the cause.

## FOURTEENTH.

That the said decrees unlawfully deprive the plaintiff of his constitutional right to invoke the jurisdiction of the District Court in the contro-

versy in this cause by the methods and processes provided by law whereby he is entitled to invoke and make the jurisdiction of the Court effective by such processes and means as will protect his property rights as well as his rights as a citizen of the United States to litigate said claim in this Court.

## FIFTEENTH.

In that in and by said decrees the Court refused to give the plaintiff the protective relief prayed by restraining order, injunction or Receiver, to protect and conserve the property in the district *pendente lite*, and to allow the controversy to proceed in due course of equity proceedings, and thereby the Court, in advance of the time and stage of the proceedings at which such rights of the parties could be lawfully adjudicated, deprived itself of jurisdiction to enforce plaintiff's rights as to the *res* in said controversy, and so deprived plaintiff of his constitutional right of due process of law.

770

Dated, New York, April 10th, 1920.

ERWIN, FRIED & CZAKI,

Solicitors for appellant,

Office and Post Office Address,

15 William Street,

New York City.

Service of copies of the foregoing assignments of error are admitted by Walter H. Merritt, Esq., and Messrs. Esselstyn & Haughwout, appearing specially April 10, 1920, and said assignments of error are marked filed United States District Court, Southern District of New York, April 10, 1920.

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**Deposit in Lieu of Bond for Costs on  
Appeal.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

---

HENRY S. DE REES,  
Plaintiff,

against

773

DAVID COSTAGUTA, MARCOS A.  
ALGIERS, ALEJANDRO SASSOLI,  
EUGENIO OTTOLENGHI, indi-  
vidually and as copartners in  
business composing the copart-  
nership of David Costaguta &  
Company, Renado Taffell and  
the American-European Trad-  
ing Corporation,

Defendants.

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E 17-201

774

The plaintiff having appealed from the decrees of this Court entered on the 10th day of April, 1920, to the Supreme Court of the United States, presenting to the undersigned Judge a citation to be signed by him, now tenders to the Court the sum of \$250.00 to be deposited with the Clerk of the said District Court, subject to the orders of the Court, as security that the said appellant shall prosecute his appeal to effect, and if he shall fail to make his plea

*Certificate of Deposit.*

775

good, shall answer all costs, which may be awarded against him by reason of said appeal.

Dated, New York, April 10th, 1920.

ERWIN, FRIED & CZAKI,  
Solicitors for Pltff.

Approved:

LEARNED HAND,  
D. J.

April 10, 1920.

Received the \$250 mentioned above April 10, 1920.

776

ALEXANDER GILCHRIST,  
Clerk.

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Service of the foregoing certificate of deposit is admitted by Walter H. Merritt, Esq., and Messrs. Esselstyn & Haughwout April 10, 1920, appearing specially, and said certificate is marked filed United States District Court, Southern District of New York, April 10, 1920.

777

778

**Citation.**

UNITED STATES OF AMERICA,

THE PRESIDENT OF THE UNITED STATES.

To :

David Costaguta, Marcos A. Algiers, Alejandro Sassoli, Eugenio Ottolenghi, individually and as copartners in business composing the copartnership of David Costaguta & Company, Renado Taffell and the American-European Trading Corporation.

779

## GREETING :

YOU ARE HEREBY CITED AND ADMONISHED to be and appear before the Supreme Court of the United States, to be holden at the Capitol, in the City of Washington, D. C., on the 8th day of May, 1920, pursuant to an order, allowing an appeal, filed in the office of the Clerk of the District Court of the United States for the Southern District of New York, wherein Henry S. De Rees is the plaintiff and appellant, and you are the appellees, and you are ordered to show cause, if any there be, why the decrees in said cause mentioned should not be corrected and speedy justice should not be done in that behalf.

780

GIVEN under my hand at the Borough of Manhattan, in the City of New York, Southern District of New York, this 10th day of April, in the year of our Lord One thousand nine hundred and twenty and of the Independence of

*Citation.*

781

the United States the one hundred and forty-fourth.

LEARNED HAND,  
*Judge of the District Court of the  
United States, for the Southern  
District of New York.*

Service of copies of foregoing citation is admitted by Walter H. Merritt, Esq., and Messrs. Esselstyn & Haughwout, April 10, 1920, appearing specially, and said citation is marked filed United States District Court, Southern District of New York, April 10, 1920.

782

783

784 **Order Granting Stay Pending Appeal.**

IN THE  
DISTRICT COURT OF THE UNITED STATES  
FOR THE SOUTHERN DISTRICT OF NEW YORK.

HENRY S. DE REES,  
Plaintiff-Appellant,  
against

785 DAVID COSTAGUTA, MARCOS A.  
ALGIERS, ALEJANDRO SASSOLI,  
EUGENIO OTTOLENGHI, indi-  
vidually and as copartners in  
business composing the copart-  
nership of David Costaguta &  
Company, Renado Taffell and  
the American-European Trad-  
ing Corporation,  
Defendant-Appellees.

This cause having come on to be heard at a Term of this Court, and having been argued by counsel, due deliberation having been had thereon, it was

786 ORDERED, ADJUDGED AND DECREED that pending the appeal of the plaintiff herein already taken to the Supreme Court, the defendant American-European Trading Corporation shall not reduce its assets in the Southern District of New York below the sum of \$110,000.

It is a condition of this order that the plaintiff shall file a bond of \$2,000 conditioned to pay any



*Order Granting Stay.*

787

damages sustained by the aforesaid defendant, by reason of this order, with leave to defendant to move for an increase in the same after July 1st, 1920.

Dated, April 15, 1920.

LEARNED HAND,  
U. S. D. J.

The foregoing order is marked filed United States District Court, Southern District of New York, April 20, 1920, and annexed thereto are the following returns of the United States Marshal. 788

I CERTIFY that on the 16th day of April, 1920, at the City of New York, in my district, I personally served the within certified copy of order upon the within named defendant Renado Taffell, by exhibiting to him at No. 22 White Street, N. Y. City, the within certified copy and at the same time leaving with him a certified copy thereof.

THOMAS D. McCARTHY,  
United States Marshal,  
Southern District of New York. 789

Dated, April 20, 1920.

790

*Order Granting Stay.*

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I CERTIFY that on the 16th day of April, 1920, at the City of New York, in my district, I served the within certified copy of order upon the within named American-European Trading Corporation, by exhibiting to Renado Taffell, as Secretary and Treasurer of said corporation, at 22 White Street, N. Y. City, the within certified copy and at the same time leaving with him a certified copy thereof.

THOMAS D. McCARTHY,  
United States Marshal,  
Southern District of New York.

791

Dated, April 20, 1920.

792

**Bond on Stay Pending Appeal.**

793

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

HENRY S. DE REES,  
Plaintiff-Appellant,  
against

DAVID COSTAGUTA, MARCOS A.  
ALGIERS, ALEJANDRO SASSOLI,  
EUGENIO OTTOLENGHI, indi-  
vidually and as copartners in  
business composing the copart-  
nership of David Costaguta &  
Company, Renado Taffell and  
the American-European Trad-  
ing Corporation,  
Defendants-Appellees.

Equity 17-201

794

KNOW ALL MEN BY THESE PRESENTS, That Henry S. De Rees, the plaintiff above named, as Principal, and the National Surety Company of the City of New York, as Surety, are held and firmly bound in the penal sum of Two thousand Dollars (\$2,000.00), lawful money of the United States of America, unto Alexander Gilchrist, Clerk of the District Court of the United States for the Southern District of New York, his successor or successors, for which payment to be made the undersigned bind themselves, their heirs, executors, adminis-

795

trators, successors and assigns, firmly by these Presents.

Sealed with our Seals and dated the 16th day of April, in the year One thousand nine hundred and twenty.

WHEREAS, heretofore and on the 10th day of April, 1920, final decrees were made and entered in the above-entitled action, among other things, dismissing the bill of complaint of the plaintiff herein as against all of the said defendants; and

797 WHEREAS, on said 10th day of April, 1920, the above-named plaintiff did duly appeal to the Supreme Court of the United States from said final decrees dismissing the said bill of complaint, among other things; and

WHEREAS, on the 15th day of April, 1920, an order was made and entered in said above-entitled action providing that, pending the appeal of the plaintiff, the defendant American-European Trading Corporation shall not reduce its assets in the Southern District of New York below the sum of \$110,000.00 and that, as a condition for said order, the plaintiff shall file a bond of \$2,000.00 conditioned to pay any damages sustained by said defendant American-European Trading Corporation by reason of said order;

798 NOW, THEREFORE, the condition of the above obligation is such that if the appeal from said decrees be dismissed by the plaintiff, or the said decrees be affirmed by the Supreme Court of the United States, the plaintiff will, on demand, pay to the defendant American-European Trading Corporation all legal damages accruing to it by reason of said order, then

the above obligation to be void, otherwise to remain in full force and virtue.

Signed, sealed and delivered  
in the presence of :

HENRY S. DE REES.

By

ARTHUR P. WEST,  
Vice-President.

Attest :

E. M. McCARTHY,  
Resident Vice-President.

(Seal)

COUNTY OF NEW YORK, ss. :

800

On this 16 day of April, 1920, before me personally appeared the within named Henry S. De Rees, to me known, and known to me to be the individual described in and who executed the within bond, and he acknowledged that he executed the same.

H. E. EMMETT,

Notary Public for Kings County, No. 18.

Certificate filed in New York County,

No. 36; Nassau; Bronx, No. 6;

Queens, No. 631; Richmond &

Westchester Counties.

Kings County Register's office, No.  
2012.

New York County Register's office,  
No. 2026.

Bronx County Register's office No.  
2218.

My commission expires March 30,  
1922.

801

## NATIONAL SURETY COMPANY

Capital \$4,000,000.00

AFFIDAVIT, ACKNOWLEDGMENT AND JUSTIFICATION  
BY GUARANTEE OR SURETY COMPANYSTATE OF NEW YORK, }  
COUNTY OF NEW YORK. } ss. :

803 On this 16th day of April, one thousand nine hundred and twenty, before me personally came Arthur P. West, known to me to be the Vice-President of the National Surety Company, the corporation described in and which executed the within and foregoing Bond of Henry S. De Rees, as a surety thereon, and who, being by me duly sworn, did depose and say that he resides in the City of New York, State of New York; that he is the Vice-President of said Company, and knows the corporate seal thereof; that the said National Surety Company is duly and legally incorporated under the laws of the State of New York; that said Company has complied with the provisions of the Act of Congress of August 13th, 1894; that the seal affixed to the within Bond of Henry S. De Rees, is the corporate seal of said National Surety Company, and was thereto affixed

804 by the order and authority of the Board of Directors of said Company; that he signed his name thereto by like order and authority as Vice-President of said Company; that he is acquainted with E. M. McCarthy and knows him to be the resident Assistant Secretary of said Company; that the signature of said E. M. McCarthy, subscribed

*Bond.*

805

to said Bond is in the genuine handwriting of said E. M. McCarthy, and was thereto subscribed by order and authority of said Board of Directors; and in the presence of said deponent; that the assets of said Company, unencumbered and liable to execution, exceed its debts and liabilities of every nature whatsoever, by more than the sum of Eight Million (\$8,000,000) Dollars.

That.....is the agent to acknowledge service for said Company in the Judicial District wherein this bond is given.

ARTHUR P. WEST.

Sworn to, acknowledged before me, and subscribed in my presence this 16th day of April, 1920.

806

H. E. EMMETT,

(Seal) Notary Public for Kings County, No. 18.  
Certificate filed in New York County,  
No. 36; Nassau; Bronx No. 6;  
Queens No. 631; Richmond & West-  
chester Counties; Kings County  
Register's Office, No. 2012; New  
York Register's office, No. 2026;  
Bronx County Register's office,  
No. 2218.

My commission expires March 30,  
1922.

Approved as to form and sufficiency.

807

LEARNED HAND,

D. J.

Marked filed United States District Court, Southern District of New York, April 19, 1920.

**Stipulation.**

IT IS HEREBY STIPULATED AND AGREED that the foregoing is a true transcript of the record of the District Court in the above entitled matter, as agreed on by the parties, the same embracing the complete record of the proceedings in the said District Court, and proceedings therein for appeal to the United States Supreme Court, and the same may be certified as such by the Clerk of the said District Court.

Pursuant to Rule XI. of the United States Supreme Court, it is further AGREED that the translations into English of the Spanish contract, papers, accounts and documents in the foregoing transcript of record, are hereby admitted to be correct translations thereof.

Dated, April 27, 1920.

MARION ERWIN,  
FREDERICK M. CZAKI,

Solicitors for plaintiff-appellant.

ESSELSTYN & HAUGHWOUT,  
Solicitors for Taffell & American-  
European Trading Corporation,  
appellees, appearing specially.

WALTER H. MERRITT,  
Solicitor for Costaguta, Algiers,  
Sassoli, Ottolenghi & David Cos-  
taguta & Co., appellees, appear-  
ing specially.



## Clerk's Certificate.

811

UNITED STATES OF AMERICA, }  
SOUTHERN DISTRICT OF NEW YORK, } ss.:

HENRY S. DE REES,  
Plaintiff-Appellant,

vs.

DAVID COSTAGUTA *et als.*,  
Defendants-Appellees.

E 17-201

I, ALEXANDER GILCHRIST, JR., Clerk of the District Court of the United States for the Southern District of New York, do hereby certify that the foregoing is a correct transcript of the record of the District Court in the above-entitled matter, the same embracing the complete record of the proceedings in the said District Court, and proceedings therein for appeal to the United States Supreme Court, as agreed upon by the parties.

812

IN TESTIMONY WHEREOF, I have caused the Seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this 14<sup>TH</sup> day of May, in the year of our Lord one thousand nine hundred and twenty and of the Independence of the said United States the one hundred and forty-fourth.

813

ALEXANDER GILCHRIST, JR.,  
Clerk.

MAY 15 1929

JAMES B. MAHER,

# Supreme Court of the United States

No. **1841**

**HENRY S. DE REES,**

*Plaintiff-Appellant,*

*against*

**DAVID COSTAGUTA, MARCOS A. ALGIERS, ALEJAN-  
DRO SASSOLI, EUGENIO OTTOLENGHI, individually  
and as co-partners in business composing the co-partner-  
ship of David Costaguta & Company, BENADO TAF-  
FELL and the AMERICAN-EUROPEAN TRADING  
CORPORATION,**

*Defendants-Appellees.*

## **MOTION TO ADVANCE CAUSE FOR HEARING**

**MARION ERWIN,**

**FREDERICK M. CZAKI,**

*Solicitors for Plaintiff-Appellant.*

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1920.

HENRY S. DE REES

VS.

DAVID COSTAGUTA *et al.*

2

Appeal from the United States District Court  
for the Southern District of New York.

**Motion by the Plaintiff Under Rule 32  
to Advance.**

COMES NOW the plaintiff, by his solicitors,  
Marion Erwin and Frederick M. Czaki, and re-  
spectfully moves the Court to place the above en-  
titled cause on the summary docket for hearing  
on a day convenient to the Court during the next  
term.

This is a suit in equity filed by the plaintiff on  
March 10th, 1920, in the District Court of the  
United States for the Southern District of New  
York, against David Costaguta, Marcos A. Algiers,  
Alejandro Sassoli and Eugenio Ottolenghi, indi-  
vidually and as co-partners composing the firm of

3

- 4 David Costaguta & Company, Renado Taffell and the American-European Trading Corporation, seeking, inter alia, to establish and enforce a partnership claim and lien upon certain designated personal property within the Southern District of New York, the allegations of the bill averring the existence of a partnership between the plaintiff and the defendants Costaguta, Algiers, Sassoli and Ottolenghi. A more particular description of the bill, the relief prayed for therein, and the proceedings had in said cause subsequent to the filing of said bill, together with extracts from the record, being averred and set out in the accompanying affidavit, to which the Court's attention is respectfully directed.

- 5 That the said District Court, upon the return of a rule nisi for the appointment of a Receiver and for an injunction pendente lite, dismissed the bill of complaint as to all of the defendants and entered final decrees dismissing the bill, vacating the service of the subpoena and vacating an order for substituted service upon the non-resident alien defendants, upon the ground that the Court was without jurisdiction of the parties to or of the subject-matter of the suit.

- 6 That thereupon the plaintiff filed his petition for an appeal to this Court, pursuant to Section 238 of the Judicial Code, which was duly allowed, and the said District Court duly certified that the final decrees, dismissing said bill, were entered solely because the cause, as made by the bill, did not set forth a legal or equitable claim to or lien upon property in the District of which said Court had jurisdiction, within the meaning of Section 57 of the Judicial Code, or a suit in which said Court

could render a judgment otherwise than a judgment in personam against the non-resident aliens who had appeared specially and objected to the jurisdiction of the Court. 7

That the only question in issue in the above cause is that of the jurisdiction of the Court below and it requires no extended argument and can readily be presented by each side conformably to the rule for causes advanced and placed upon the summary docket of this Court.

Notice of this motion and of the accompanying affidavit has been served on opposing counsel.

MARION ERWIN,  
FREDERICK M. CZAKI,  
Solicitors for Plaintiff-Appellant, 8  
15 William St.,  
New York City.



**Notice of Motion.**

**Supreme Court of the United States**

HENRY S. DE REES,  
Plaintiff-Appellant,  
against

DAVID COSTAGUTA, MARCOS A.  
ALGIERS, ALEJANDRO SASSOLI,  
EUGENIO OTTOLENGHI, individ-  
ually and as co-partners in  
business composing the co-  
partnership of David Costagu-  
ta & Company, RENADO TAF-  
FELL and the AMERICAN-EURO-  
PEAN TRADING CORPORATION,  
Defendants-Appellees.

2

*Sirs:*

YOU WILL PLEASE TAKE NOTICE that upon the record herein, duly docketed in the office of the Clerk of this Court, and the annexed affidavit of Frederick M. Czaki, verified the 27th day of April, 1920, the undersigned will respectfully move this Court at a Stated Term thereof, to be held at the Capitol, in the City of Washington, District of Columbia, on the 17th day of May, 1920, at the open-

3

- 4 ing of the Court on said day, or as soon thereafter as counsel can be heard, that an order be made and entered herein directing that the above entitled cause be advanced for hearing upon the docket of this Court, pursuant to the provisions of Rule 32, upon the ground that the only question at issue is the question of the jurisdiction of the District Court of the United States for the Southern District of New York, from which the appeal herein has been taken pursuant to Section 238 of the Judicial Code, and that the plaintiff-appellant have such further and other relief as to this Honorable Court may seem just and proper.

Dated, New York, April 27th, 1920.

5

Yours, etc.,

MARION ERWIN,  
FREDERICK M. CZAKI,  
Solicitors for Plaintiff-Appellant,  
15 William Street,  
New York City.

To:

ESSELSTYN & HAUGHWOUT, Esqs.,  
Attorneys for Defendants-Appellees Taffell  
and American-European Trading Corporation,  
2 Rector Street,  
New York City.

6

WALTER H. MERRITT, Esq.,  
Attorneys for Defendants-Appellees Costaguta,  
Algiers, Sassoli, Ottolenghi and David Cos-  
taguta & Company,  
54 Wall Street,  
New York City.



**Affidavit of Frederick M. Czaki.**

7

**SUPREME COURT OF THE UNITED STATES.**

HENRY S. DE REES,  
Plaintiff-Appellant,

against

DAVID COSTAGUTA, MARCOS A.  
ALGIERS, ALEJANDRO SASSOLI,  
EUGENIO OTTOLENGHI, individ-  
ually and as co-partners in  
business composing the co-  
partnership of David Costagu-  
ta & Company, RENADO TAF-  
FELL and the AMERICAN-EURO-  
PEAN TRADING CORPORATION,  
Defendants-Appellees.

8

CITY AND STATE OF NEW YORK, }  
COUNTY OF NEW YORK, } ss. :

FREDERICK M. CZAKI, being duly sworn, deposes  
and says:

I. That he is one of the solicitors of the plaintiff-  
appellant in the above entitled cause, and has been  
and now is in charge of the conduct of the said  
cause and is familiar with the facts and circum-  
stances in relation thereto.

9

II. That on the 10th day of March, 1920, the  
above named plaintiff-appellant, averring himself  
to be a citizen of the State of New Jersey, duly  
filed in the office of the Clerk of the District Court

10 of the United States for the Southern District of New York a bill in equity against the above named defendants, averring that the defendants David Costaguta and Alejandro Sassoli were citizens and subjects of the Kingdom of Italy, Eugenio Ottolenghi a citizen of the Republic of Argentine, and Marcos A. Algiers a citizen of the Republic of France, and that said David Costaguta, Alejandro Sassoli, Eugenio Ottolenghi and Marcos A. Algiers were and now are residents of the City of Buenos Aires, Republic of Argentine. That the defendant the American-European Trading Corporation was a corporation organized under and existing by virtue of the laws of the State of New York, and having its office and place of business in the City of New York, Southern District of New York.

11 That the defendant Renado Taffell was a citizen of the Kingdom of Great Britain and Ireland, and now is a resident of the said Southern District of New York, and that said Taffell is the Secretary and Treasurer of the defendant the American-European Trading Corporation, and one Leon Grumet is the President thereof, and that said Grumet is, under power of attorney, the agent and duly constituted representative in the Southern District of New York of the said defendants Costaguta, Algiers, Sassoli and Ottolenghi, doing business under the firm name of David Costaguta & Company.

12 III. That in and by said bill, as aforesaid, the said plaintiff-appellant asserted and sought to enforce a co-partnership claim and lien upon certain designated specified personal property within the Southern District of New York, the allegations of said bill averring that a partnership existed between the plaintiff-appellant and the said defend-

ants Costaguta, Algiers, Sassoli and Ottolenghi, an agreed translation of the articles of co-partnership being contained in the record herein. That said bill further alleged an actual termination of the partnership relation by the notice provided for in said contract and notice to liquidate the property of the co-partnership pursuant thereto, and that a liquidation of the property of the co-partnership was in process between said co-partners. That said bill further alleged that said non-resident alien defendants, in violation of the contract, had taken possession of all of the assets of the co-partnership to the exclusion of the plaintiff-appellant and without his consent had converted a large part thereof located in the Southern District of New York to their own use, by transferring the same to the defendant corporation, which was created by said non-resident alien defendants since said liquidation was commenced, and that said property of said co-partnership was so transferred to said defendant corporation by said non-resident alien defendants, without consideration, and that they, said non-resident alien defendants, own all of the corporate stock of said defendant corporation.

IV. The bill prayed, among other things, that the plaintiff-appellant be decreed to have a lien upon all the property of the said co-partnership within the district, and upon all of the property of the said non-resident defendants and of said defendant corporation within the district, into which the property or assets of the co-partnership have been converted or commingled, and that all of said property of said co-partnership and the capital stock of the defendant corporation standing in the name of said non-resident alien defendants in the

- 16 district be decreed to be charged with a trust in favor of the plaintiff. That by its decree the Court will declare said co-partnership dissolved, and will appoint a receiver to preserve, conserve and administer said co-partnership assets and the properties into which they have been so converted *pendente lite*, and that the defendants be restrained and enjoined *pendente lite* from disposing of or removing without the jurisdiction of the Court the property of said co-partnership or the property of the said defendants into which the property of the said co-partnership had been commingled or converted. It contained the usual prayer for subpoena, and prayed that the District Court shall make an order setting forth that the plaintiff claims an interest
- 17 in and lien upon said property, the situs of which then was in the district, and requiring such non-resident alien defendant as may not then be found in the district to demur, plead or answer to the bill on or before a day therein to be named, and for publication of said order in accordance with the statute in such case made and provided. The bill prayed for a liquidation of the assets within the jurisdiction of the Court, through the receiver of the Court, an accounting from the defendants and the determination and enforcement of plaintiff's co-partnership interest upon the assets within the jurisdiction of the Court and for general relief.

18

V. That on said 10th day of March, 1920, a writ of subpoena was duly issued out of the District Court of the United States for the Southern District of New York, directed to each and all of the defendants, and the same was duly served upon the

resident defendant, the American-European Trading Corporation, and the resident defendant Renaldo Taffell, and was likewise served upon one Leon Grumet, as agent and attorney in fact of the non-resident alien defendants. That a return was made on said subpoena by the United States Marshal for the Southern District of New York that, after due and diligent search, he was unable to find within the Southern District of New York, the said non-resident alien defendants. 19

VI. That simultaneously with the filing of the said bill of complaint as aforesaid, the said District Court, upon affidavit and exhibits thereto annexed, issued a rule *nisi*, requiring the defendants to show cause, at a time therein stated, why a receiver should not be appointed and an injunction granted *pendente lite*, said rule *nisi* containing a temporary restraining order enjoining and restraining said defendants, their agents and attorneys, pending the hearing and determination upon the return of said rule *nisi*, from in any manner disposing of or removing from the jurisdiction of said District Court, any of the property of said co-partnership or of said defendants into which the property of said co-partnership was converted and commingled, said rule *nisi* and the papers upon which it was granted having been duly served upon the resident defendants, the agent and attorney in fact of the non-resident alien defendants, said Leon Grumet, and upon all persons, firms and corporations having possession, custody or control of any of said property and of the property more particularly mentioned and described in said bill of complaint and upon which said plaintiff asserted and sought to enforce his claim and lien. 20 21

22 VII. That thereafter and on the 16th day of March, 1920, the said District Court, upon the affidavit of your deponent verified the 15th day of March, 1920, and the return of the United States Marshal, duly made its order in said cause requiring said non-resident alien defendants to appear, plead, answer or demur to said bill of complaint on or before a day therein named, and directing the publication of said order and that said order with a copy of said bill of complaint and subpoena be served upon said non-resident alien defendants as therein more particularly provided and pursuant to the provisions of Section 57 of the Judicial Code, providing for substituted service upon non-resident  
23 defendants.

VIII. That thereafter and on the 19th day of March, 1920, the resident defendants American-European Trading Corporation and Renado Taffell appeared herein specially by Messrs. Esselstyn & Haughwout, for the sole purpose of objecting to the jurisdiction of said District Court and to oppose on that ground the application for the appointment of a receiver and for an injunction *pendente lite*, and that thereafter and on the 23rd day of March, 1920, the said non-resident alien defendants appeared herein specially by Walter H. Merritt, Esq., solely for the purpose of applying to the said District Court for an order vacating, quashing and  
24 setting aside the service of the said subpoena and the order of the said District Court, dated the 16th day of March, 1920, directing that substituted service of said subpoena be made upon the said non-resident alien defendants, as in said order more particularly provided, and said non-resident alien defendants did, on said 23rd day of March, 1920,

procure an order returnable upon a day therein stated, requiring the plaintiff-appellant to show cause why said service of said subpoena and said order of said District Court directing such substituted service should not be vacated, quashed and set aside and the service under said order for substituted service vacated, annulled and set aside, upon the ground that said Court was without jurisdiction over the persons of said non-resident alien defendants and of the subject-matter of this suit. 25

IX. That thereafter and upon the adjourned return day of the rule *nisi* for a receiver and injunction obtained by the plaintiff-appellant as aforesaid, all of the defendants appeared specially herein in opposition thereto, and the said non-resident alien defendants appeared in support of their application to vacate the service of said subpoena and of the order for the substituted service thereof upon said non-resident alien defendants, and a hearing was had before said United States District Court for the Southern District of New York upon the original bill, processes, orders of the Court, and service and returns made by the Marshal, and upon the moving affidavits and reply affidavits offered by the respective parties, resulting in the rendition of an opinion by said Court denying the application of the plaintiff for the appointment of a receiver and injunction *pendente lite* and granting the application of the defendants, vacating the service of said subpoena, annulling the order for substituted service and for publication thereof and of said subpoena and of the service made thereunder, and dismissing said bill of complaint. 26 27

28 X. That thereafter and on the 10th day of April, 1920, the said District Court, over the objection and exception of the plaintiff-appellant, entered its final decrees upon the motion of the defendants, among other things, dismissing the said bill of complaint as against all of said defendants and vacating said order for substituted service and the service made thereunder. That the decree entered at the instance of the resident defendants provided as follows:

"ORDERED, ADJUDGED AND DECREED, that the motion made by the plaintiff, in and by said order to show cause, be and the same hereby is denied in all respects; and it is

29

FURTHER ORDERED, ADJUDGED AND DECREED, that the temporary restraining order contained in said order to show cause be and the same hereby is vacated, annulled and cancelled in all respects; and it is

FURTHER ORDERED, ADJUDGED AND DECREED, that the bill of complaint be and the same hereby is dismissed.

LEARNED HAND,  
*U. S. D. J.*"

That the decree entered at the instance of the non-resident alien defendants provided as follows:

30

"ORDERED, ADJUDGED AND DECREED, that the said order made by the Hon. Learned Hand, United States District Judge, dated the 16th day of March, 1920, be and the same is hereby vacated, quashed and set aside in all respects, and all acts done thereunder either



by the plaintiff or by said Thomas D. McCarthy, United States Marshal, be and the same hereby are declared null and void; and it is 31

FURTHER ORDERED, ADJUDGED AND DECREED, that the alleged service of the subpoena certified by Thomas D. McCarthy, United States Marshal, in and by his certain certificate dated the 11th day of March, 1920, to have been made by him 'upon the within defendant and David Costaguta Co.,' in the manner therein stated, be and the same hereby is declared null and void and of no effect; and it is

FURTHER ORDERED, ADJUDGED AND DECREED, that the bill of complaint herein be and the same hereby is dismissed as to the defendants David Costaguta, Marcos A. Algiers, Alejandro Sassoli and Eugenio Ottolenghi, individually and as co-partners in business composing the co-partnership of David Costaguta & Company. 32

LEARNED HAND,  
*U. S. D. J.*"

XI. That thereupon and on said 10th day of April, 1920, the plaintiff-appellant duly filed his petition for an order allowing him to prosecute an appeal, as against all of said defendants, from said final decrees direct to the Supreme Court of the United States upon the grounds and for the reasons, among others, that the District Court of the United States for the Southern District of New York had refused to entertain jurisdiction of said bill of com- 33

- 34    plaint and dismissed the same for lack of jurisdiction of the subject-matter and of the parties defendant named in the bill, which said petition was duly granted and an order was duly made by said Court on said 10th day of April, 1920, allowing said appeal upon the ground that said bill of complaint was dismissed for want of jurisdiction and that said District Court of the United States for the Southern District of New York on said bill had no jurisdiction of the subject-matter and of the parties mentioned therein, and directed that the appeal to this Court from said final decrees, entered in this cause as aforesaid, be allowed and that a transcript of the record, bill, appearances, affidavits, exhibits, orders, decrees, proceedings and papers and the opinion of the Court upon which said decrees were made, duly authenticated, be sent to this Court.
- 35

XII. That simultaneously with the allowance of said appeal and on said 10th day of April, 1920, the said District Court of the United States for the Southern District did certify as follows:

- 36    “The plaintiff having entered his appeal to the Supreme Court from the decrees of this Court entered the 10th day of April, 1920, vacating the order for service by publication on the non-resident defendants, and the service of subpoena on all the defendants, and dismissing plaintiff’s bill as more particularly set forth in said decrees,

I HEREBY CERTIFY that said decrees were entered solely because the case as made by the bill did not set forth a legal or equitable claim to or lien on the property in the dis-

trict, of which this Court would have jurisdiction within the meaning of Section 57 of the Judicial Code, or in which this Court could render a judgment otherwise than a judgment in personam against the non-resident aliens who appeared specially and objected to the jurisdiction of the Court. 37

Dated, New York, April 10th, 1920.

LEARNED HAND,

District Judge of the United States, for the Southern District of New York."

That citation to the defendants were duly issued and served, and the plaintiff-appellant has duly perfected his appeal and complied with the orders of the Court providing for security for costs, and for security on an order granted by the Court retaining a substantial amount of assets within the jurisdiction under the 74 equity rule, pending the determination by this Court of said appeal. That the questions involved upon the appeal herein require no extended argument and can readily be presented by each side conformably to the rule for causes advanced and placed upon the summary docket of this court. That the record on appeal herein will be duly filed in the office of the Clerk of this Court and printed prior to the presentation of this motion. 38

WHEREFORE your deponent respectfully prays this Honorable Court that the above entitled cause be advanced upon the calendar of this Court pursuant to the provisions of Rule 32 and placed upon the summary docket, upon the ground that the only question in issue is the question of the jurisdiction 39

40 of the Court below and can be presented without extended oral argument, and that the plaintiff-appellant have such further and other relief as to this Honorable Court may seem just and proper.

That no previous application for the order herewith applied for has been made.

FREDERICK M. CZAKI.

Sworn to before me this  
27th day of April, 1920.

ANNA G. McCONNELL,  
Notary Public,  
Bronx Co. No. 1.

41 Certf. filed in N. Y. County No. 58.



FILED  
MAY 17 1920

JAMES D. WALKER  
CLERK

No. 981341

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# Supreme Court of the United States

OCTOBER TERM, 1920.

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HENRY S. DE REES,

*Petitioner,*

*against*

DAVID COSTAGUTA, MARCOS A. ALGIERS, ALE-  
JANDRO SASSOLI, EUGENIO OTTOLENGHI,  
individually and as co-partners in business composing  
the co-partnership of David Costaguta & Company,  
Renado Taffell and the American-European Trading  
Corporation.

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Appeal from Decrees of the District Court of United  
States for the Southern District of New York.

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## MEMORANDUM IN OPPOSITION TO MOTION TO ADVANCE



No.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1920.

HENRY S. DE REES,  
*Petitioner,*

*against*

DAVID COSTAGUTA, MARCOS A. ALGIERS, ALEJANDRO SASSOLI, EUGENIO OTTOLENGHI, individually and as co-partners in business composing the co-partnership of David Costaguta & Company, RENADO TAFFELL and the AMERICAN-EUROPEAN TRADING CORPORATION.

---

APPEAL FROM DECREES OF THE DISTRICT  
COURT OF UNITED STATES FOR THE  
SOUTHERN DISTRICT OF NEW YORK.

---

MEMORANDUM IN OPPOSITION TO MOTION TO  
ADVANCE.

---

The Notice of Motion states that the petitioner moves for an order "directing that the above entitled cause be advanced for hearing upon the docket of this Court, pursuant to the provisions of Rule 32, upon the ground that the only question at issue is the question of the jurisdiction of the District Court of the United States for the Southern District of New York."



The respondents, David Costaguta, Marcos A. Algiers, Alejandro Sassoli, Eugenio Ottolenghi, individually and as co-partners in business composing the co-partnership of David Costaguta & Company, (who have appeared specially herein as appears in and by their notice of special appearance and supplemental notice of special appearance to be found on Page 116 to 120 in the Transcript of Record), wish to have an opportunity to argue orally before this Court, the questions presented on this appeal, and accordingly oppose this motion to advance the hearing of this appeal under Rule 32 of this Court.

The bill of complaint prays for a decree for the dissolution of an alleged partnership claimed by the plaintiff to exist between himself and David Costaguta, Marcos A. Algiers, Alejandro Sassoli, Eugenio Ottolenghi individually and as co-partners in business composing the co-partnership of David Costaguta & Company, and for an accounting of the business transacted by such alleged partnership. Whether there was such a partnership depends upon the construction of a certain written contract entered into between the parties and the legal effect to be given to certain provisions thereof and will require extended *argument* ~~adjustment~~.

Furthermore, the District Judge has certified that the decrees dismissing the bill of complaint "were entered solely because the case as made by the bill did not set forth a legal or equitable claim to or lien on the property in the district, of which this Court would have jurisdiction within the meaning of Section 57 of the Judicial Code, or in which this Court could render a judgment other-

wise than a judgment in personam against the non-resident aliens who appeared specially and objected to the jurisdiction of the Court." Whether the bill of complaint sets forth a "legal or equitable claim to or lien on property in the District," so as to meet the requirements of Section 57 of the Judicial Code, presents many questions, which in the opinion of counsel for respondents, cannot be properly argued within the period of a half hour allotted to each side, if placed on the Summary Docket, assuming that this appeal is one which, under the rules of this Court, can be advanced to Summary Docket, which respondents doubt. Moreover, this appeal involves a peculiarly private controversy relating to a peculiarly private and special contract and presents no question of general interest.

### CONCLUSION

The Motion to advance the hearing of this appeal under Rule 32 or to place the same on the Summary Docket should be denied.

Dated, New York, May 14, 1920.

Respectfully submitted,

WALTER H. MERRITT, ESQ.,  
Counsel for Respondents, Appearing  
Specially for David Costaguta, Mar-  
cos A. Algiers, Alejandro Sassoli,  
Eugenio Ottolenghi, individually and  
as co-partners in business composing  
the co-partnership of David Costa-  
guta & Company, in opposition.

# Supreme Court of the United States

October Term, 1920

No. 341

HENRY B. DE REES,

*Plaintiff-Appellant.*

vs.

DAVID COSTAGUTA, MARCOUS A. ALSIERS, ALEJAN-  
DRO RASSOLI, EUGENIO OTTOLENGHI, individually  
and as co-partners in business, composing the co-partner-  
ship of David Costaguta & Company; BENADO TAF-  
FELL and the AMERICAN EUROPEAN TRADING  
CORPORATION,

*Defendants-Appellees.*

## BRIEF OF SOLICITORS FOR PLAINTIFF- APPELLANT.

ERWIN, FRIED & OZAKI,

*Solicitors for Appellant.*

MARION ERWIN,  
FREDERICK M. OZAKI,  
of Counsel.

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# Supreme Court of the United States

OCTOBER TERM, 1920—No. 931.

HENRY S. DE REES,  
Plaintiff-Appellant,  
against

DAVID COSTAGUTA, MARCUS A.  
ALGIERS, ALEJANDRO SASSOLI,  
EUGENIO OTTOLENGHI, individ-  
ually and as co-partners in  
business, composing the co-  
partnership of David Cos-  
taguta & Company; RENADO  
TAFFELL and the AMERICAN-  
EUROPEAN TRADING CORPORA-  
TION,

Defendants-Appellees.

## BRIEF OF SOLICITORS FOR PLAINTIFF-APPELLANT.

This is an appeal from the District Court of the United States for the Southern District of New York under Section 238 of the Judicial Code, and we think the power of this Court to review the decrees appealed from (Rec., pp. 241-244) exists under said section as well on the constitutional question made as to the power of the Court

exercised in dismissing the bill for want of jurisdiction, in the manner and form in which it was done, as on the jurisdictional question made and certified, and that the powers of this Court, on review, are plenary.

### **Statement of the Case.**

#### **AVERMENTS OF THE BILL AS TO GENERAL JURISDICTION.**

The bill in equity in this cause was filed in the Clerk's Office of the District Court of the United States for the Southern District of New York on March 10, 1920, by the plaintiff, averring himself to be a citizen and resident of the State of New Jersey, against David Costaguta and Alejandro Sassoli, averred to be citizens and subjects of the Kingdom of Italy and residents of the Republic of Argentine, and against Eugenio Ottolenghi, averred to be a citizen of the Republic of Argentine and a resident of the City of Buenos Aires in the Republic of Argentine, and against Marcos A. Algiers, averred to be a citizen of the Republic of France and a resident of the City of Buenos Aires in the Republic of Argentine, and against Renado Taffell, averred to be a citizen of the Kingdom of Great Britain and Ireland and a resident of the City of New York in the Southern District of New York, and against the American-European Trading Corporation, averred to be a corporation organized under the laws of the State of New York and having its office for the transaction of its business in the City of New York in said Southern District of New York (Rec., pp. 2-3).

JURISDICTIONAL AVERMENTS OF THE BILL AS TO  
SUBJECT-MATTER.

As set forth in the bill (Rec., p. 5), a contract (Translation, Rec., p. 82) was entered into at Buenos Aires on November 1, 1917, between the plaintiff and the defendants David Costaguta, Marcos A. Algiers, Alejandro Sassoli and Eugenio Ottolenghi, as partners then constituting the firm of David Costaguta & Company, whereby a co-partnership was formed between the said four parties in the ownership and conduct of a business in the buying and selling of hosiery, to be organized under the designation of "Hosiery Section" of David Costaguta & Company, to be carried on in the City of Buenos Aires and elsewhere. The new partnership so formed took over the assets and liabilities then existing of a previous and somewhat similar business previously done by the plaintiff and two of the members of the firm of David Costaguta & Company, in which plaintiff had a large, at that time, unsettled interest (Rec., p. 4). Shortly after the execution of the contract for said hosiery section, designated in the bill for brevity as the co-partnership, the plaintiff on November 20, 1917, on the business of the co-partnership, left Buenos Aires (Rec., p. 12) for New York, where he established in the City of New York (Rec., p. 12) a place of business of the said co-partnership for purchasing and selling its merchandise, and a large business was so done there and in Buenos Aires by said co-partnership, as well in selling merchandise directly to customers in New York, and in various countries of South America, as in the purchasing of merchandise transshipped from New York to be sold by said co-partnership at or from its place of business in Buenos Aires.

Thereafter disagreements arose (Rec., p. 15) between the plaintiff on the one side and the other

members of the co-partnership, who constituted the firm of David Costaguta & Company, because of which on August 22, 1919, plaintiff gave notice in writing (Rec., p. 17), in accordance with a provision of the co-partnership contract, that plaintiff elected to terminate said contract of co-partnership, to take effect November 22, 1919. That on September 19, 1919, the said David Costaguta & Company acknowledged receipt of said notice and accepted the termination of said contract to take effect on November 22, 1919. That thereafter, on November 10, 1919, plaintiff, as provided in said contract, gave to said David Costaguta a formal written notice (Rec., p. 19) that he elected to and did demand a complete liquidation of the co-partnership under the provisions of said contract providing for complete liquidation on said demand, to which complete liquidation David Costaguta agreed (Rec., p. 17) in writing, and the liquidation was entered upon on November 22, 1919.

The bill alleges the failure and refusal (Rec., pp. 16, 17) of David Costaguta & Company to give to the plaintiff the complete periodical accounting provided for in the contract, they, under the contract of co-partnership, being in charge at Buenos Aires of the principal books of account, and their failure to render any statement of account of the business done after the business year of 1918, which terminated October 31, 1918.

The bill alleges that David Costaguta & Company, by its representatives sent to New York (Rec., pp. 15, 16, 17), one of whom was the defendant Eugenio Ottolenghi (Rec., p. 19), a co-partner in the said hosiery section, attempted to and did interfere with and largely superseded the plaintiff in the conduct of the affairs of said co-partnership.

That (Rec., p. 18) on or about November 22, 1919, there remained and was on hand and unsold in the

City of New York in the Southern District of New York merchandise belonging to said co-partnership of the value of about \$100,000, which was in the premises occupied by said co-partnership at No. 22 White Street in said city and district, and various warehouses in said city and district in the name and in the possession of said David Costaguta & Company, holding the same for said co-partnership, and which the plaintiff attempted to sell and liquidate for the best interest of said co-partnership, but that said David Costaguta & Company refused to permit the plaintiff to sell to the best advantage, but that said David Costaguta endeavored to sell and did sell large quantities thereof at a sacrifice, at a loss and below market value.

That during the period from November 22, 1919, and February 20, 1920, the funds of said co-partnership in the City of New York (Rec., p. 19) were commingled with the private funds of said David Costaguta & Company and deposited in the name of said David Costaguta & Company in certain mentioned banks in New York City and in New Jersey.

That during said period the said David Costaguta & Company had (Rec., p. 19) title, possession, custody and control in the City of New York, Southern District of New York, among other things, of a large amount of merchandise and other assets which were purchased and acquired by said David Costaguta & Company with the commingled funds belonging to the said David Costaguta & Company and said co-partnership.

That in or about the month of January, 1920 (Rec., p. 20), the said David Costaguta & Company, for the purpose of defrauding the plaintiff and intending thereby to thwart him in the ascertainment of his just rights and remedies, and to prevent him from receiving and collecting from the

property of said co-partnership the moneys justly due to him, conceived the scheme and design of organizing a corporation under the laws of the State of New York, to which it would transfer and convey all the property, assets and effects of said co-partnership, and all of the property, assets and effects of the said David Costaguta & Company held in the City of New York aforesaid. That in pursuance of said fraudulent scheme the said David Costaguta & Company (Rec., p. 21) on or about January 31, 1920, caused to be incorporated and organized the defendant the American-European Trading Corporation under the laws of New York, with an authorized capital of \$10,000, divided into shares of \$100 each, with dummy incorporators and dummy directors named in the certificate of incorporation, who were not required to be stockholders, and that all of the stock of the said corporation is owned and held by the said David Costaguta & Company, to whom it was issued in alleged consideration of the transfers to it thereafter mentioned.

That immediately after the organization of said corporation (Rec., p. 22), in furtherance of said fraudulent scheme, on or about February 1, 1920, and thereafter, without the consent of the plaintiff, the said David Costaguta & Company transferred, conveyed and set over to the said corporation all of the merchandise, property, money accounts, choses in action and other assets of the co-partnership, as well as all of the merchandise, property, money accounts, choses in action and other assets belonging to the said David Costaguta & Company. That said transfers were made in bulk, not in the usual course of trade in liquidation of the co-partnership assets, without any actual consideration paid therefor otherwise than the issuance by said corporation of all its capital stock to said David Costaguta & Company.

That said David Costaguta & Company closed and discontinued (Rec., p. 23) all of its said bank accounts and the large sums of money so withdrawn were deposited in part to the credit of said defendant corporation and in part in the name of the defendant Renado Taffell, who since said transfer has been disbursing the same in his individual name for the benefit and account of said defendant corporation and the said David Costaguta & Company.

That there is now in the possession, custody and control of said defendant corporation in the Southern District of New York (Rec., p. 23) twenty-two cases of hosiery of the value of about \$15,000, the property of the said co-partnership, all the accounts outstanding due to the co-partnership on the sale of hosiery aggregating many thousand dollars; 9091 hides of the value of about \$150,000, acquired by the said David Costaguta & Company with the commingled funds of the co-partnership, besides other property. That in addition there was other property of said co-partnership transferred to said corporation by said David Costaguta & Company, consisting of contracts for the purchase of merchandise and claims against various business concerns for breaches of contract of sale, which are specified in the bill, aggregating many thousand dollars.

Besides the property held by the defendants in the Southern District of New York, it is averred in the bill that, becoming cognizant of the scheme so formed of said David Costaguta & Company to so transfer the assets of said co-partnership and place the same in hands where he would be deprived of his rights therein (Rec., pp. 20-21), the plaintiff held possession of sixty-five cases of hosiery which had been billed to a customer on negotiations for sales which fell through and were not consummated; of which plaintiff sold thirty-two



cases for \$20,840.25, which included a profit of \$5,000, and plaintiff still holds in the district thirty-three cases unsold, all of which the plaintiff holds for the benefit of the co-partnership subject to the accounting herein.

It is further averred (Rec., p. 25) :

“And the plaintiff charges that all of the property, assets, money and effects now held by the defendants and each of them, and particularly the capital stock of the defendant, the American-European Trading Corporation, held by and in the name of the defendants, composing the partnership of David Costaguta & Company, the situs of which is in the City of New York, in the Southern District of New York, is charged with a trust and subject to the claim and lien of the plaintiff, and the plaintiff further charges that the defendants and each of them took said property charged with a trust in favor of the plaintiff and hold the same with knowledge and notice of the co-partnership lien and claim of the plaintiff and with knowledge and notice of the fact that said property was transferred with the preconceived intent and design upon the part of the said David Costaguta & Company to hinder, delay and defraud the plaintiff and to impede him in the enforcement of his legal and equitable rights and remedies.”

The prayers of the bill were for the appointment of a receiver to take charge of the assets of the co-partnership in the district and the property into which the assets of the co-partnership had gone and been commingled in the hands of the defendants and their agents and take hold and administer the same and to liquidate the affairs of the co-partnership ;

For restraining orders *pendente lite* against the defendants and their agents from disposing of said

properties or removing same from the jurisdiction of the Court;

For a decree declaring that the said co-partnership had been dissolved and directing its liquidation;

For an accounting to plaintiff by the said Costaguta, Algiers, Sassoli and Ottolenghi, composing the firm of David Costaguta & Company;

For a decree declaring that the plaintiff has a lien upon all said co-partnership property and property with which the same has been commingled or traced in the hands of the defendants and those taking with notice;

For issue of the usual equity subpoena directed to the defendants, and general relief; and

"The plaintiff further prays that in respect of such of the defendants as are not found in the District, the Court will make an order setting forth that the plaintiff is claiming an interest in and lien upon property, the situs of which is now in this District and require such defendant as may not thus be found in this District, to demur, plead or answer to this Bill at a day therein to be named, in accordance with the statute in such case made and provided."

From the foregoing it will be seen that the suit is one in the District Court of the United States for the Southern District of New York by a citizen of New Jersey to enforce his partnership lien upon property within the district against his four alien co-partners, who are non-residents of the United States (and who the subsequent proceedings show were not found by the Marshal for service within the district), and against two other defendants (who were served in the district), one of whom (Taffell) is a resident alien, alleged to be acting as an agent for the defendant co-partners and hold-

ing moneys of the co-partnership, and the other, the American-European Trading Corporation, a corporation of New York, organized by said other defendant co-partners since the co-partnership went into liquidation, and of which they own all the stock, and to which they have transferred without plaintiff's consent, a large part of the assets of the co-partnership without consideration and not in the usual course of trade in liquidation and which took and holds the assets with notice of plaintiff's lien and rights.

It is to be noted that the contract of co-partnership of November 1, 1917, between the plaintiff and the members of the firm of David Costaguta & Company was written in Spanish, and a copy of it was not attached to the bill of complaint, but the provisions of the contract, clause by clause, in substance was set forth in English in the bill.

Simultaneously with the filing of the bill plaintiff filed an affidavit made by the plaintiff in support of the motion for orders for interlocutory relief prayed. To this affidavit was appended a copy of the contract, written in Spanish (Rec., p. 78), and a literal translation of it (Rec., p. 82) was agreed upon as correct by counsel for all parties (Rec., p. 270). The contract is not disputed. A correct decision of the questions involved largely turns upon that contract.

We conceive that the plaintiff is bound by the terms of the contract as set out in the said translation in matters, if any, in which there is a conflict between the written translation and the allegations of the bill as to the substance of the contract in any particular (we know of no such conflict). On the other hand, in all particulars, if any, in which said written literal translation may be ambiguous, leaving it open for the introduction of other testimony to explain or show a construction

by the acts of the parties under it, that in those particulars the construction averred in the bill will, on the determination by this Court of the correctness of the action of the Court below in dismissal of the bill on the construction of the contract for want of jurisdiction, prevail over any counter-affidavits or opinion of the lower Court on such construction. And this because the dismissal of the bill on special appearance precluded the plaintiff from all testimony under examination and cross-examination and has deprived plaintiff of his day in court on all such matters averred in the bill subject to be established by additional proofs.

**AS TO SUBPOENA—THE TEMPORARY RESTRAINING  
ORDERS AND RULES TO SHOW CAUSE AND  
SERVICE OF PROCESS.**

Equity subpoena was duly issued, directed to the several defendants on March 10, 1920 (Rec., p. 33), and served by the Marshal on the same day upon the resident defendants Renado Taffell and the American-European Trading Corporation found within the district (Rec., pp. 35-36), and on the same day the Marshal served the subpoena on Leon Grumet, alleged in the Marshal's return to be an agent of the defendants David Costaguta, Marcos A. Algiers, Alejandro Sassoli and Eugenio Ottolenghi as for service upon said non-residents (Rec., p. 36). Plaintiff has never insisted that that particular return showed any legal service upon the said non-residents. On March 11, 1920, the Marshal entered his return on the subpoena as follows:

"I hereby certify, that after diligent search, I am unable to find the within named David Costaguta, Marcos A. Algiers, Alejandro Sassoli or Eugenio Ottolenghi in my District" (Rec., p. 34).

On March 16, 1920, on affidavit verified by plaintiff's attorney on March 15, 1920, setting forth the fact that the Marshal had entered his return on the subpoena, that he was unable to find the said non-resident aliens above named within the district, plaintiff moved the Court for an order for service upon them by publication against them under the provisions of Section 57 of the Judicial Code (Rec., p. 107). On March 16, 1920, in the said District Court, his Honor, Judge Learned Hand, on the said affidavit, the bill of complaint and Marshal's return, entered an order in accordance with Section 57 of the Judicial Code for service by publication upon said non-resident defendants, reciting, among other things, "it appears that the above-entitled action is brought to enforce an equitable lien upon or claim to title to personal property within this district, and that the defendants David Costaguta, Marcos A. Algiers, Alejandro Sassoli and Eugenio Ottolenghi and each of them are not now inhabitants of and cannot be found within the Southern District of New York, and that the said defendants and each of them reside in the City of Buenos Aires, Argentine Republic," and it was therein ordered that the said defendants, "appear, plead, answer or demur to the bill of complaint herein on or before the 28th day of April, 1920."

And the order further provided for its publication in the *New York Evening Post* in the issue of that newspaper of March 17, 24 and 31 and April 7, 14 and 21, 1920, and otherwise provided for service of copies of the order upon persons in possession of the property in the district as directed in the statute (Rec., p. 112). Service of the order was made by the Marshal as directed (Rec., p. 115) and its publication was proceeding as directed at the time of the dismissal of the bill and the vacating of the order as hereinafter mentioned on April 10, 1920.

On the filing of the bill and moving affidavit of the plaintiff on March 10, 1920, his Honor, Judge Hand, granted a rule *nisi* directed to each of the defendants requiring them to show cause before said District Court on March 20, or as soon thereafter as counsel could be heard, why a receiver *pendente lite* should not be appointed of the property of said co-partnership, &c., as prayed, and granting a restraining order as prayed pending the hearing on the rule *nisi*, and directing that a copy of the bill and the order be served upon such of the defendants as may be found within the district (Rec., p. 37).

The Marshal made his returns showing that on March 11, 1920, he had made service of the said rule *nisi*, or order to show cause, in his district upon the defendants Renado Taffell and the American-European Trading Corporation and upon Leon Grumet as agent and attorney in fact of the non-resident defendants on March 10, 1920 (Rec., pp. 105-106).

#### SPECIAL APPEARANCES.

On March 19, 1920, Esselstyn & Haughwout, attorneys for said Taffell and American-European Trading Corporation, entered their special appearances for said defendants for the purpose of opposing the motion made upon said order to show cause, and not otherwise (Rec., p. 116).

On March 23, 1920, Walter H. Merritt, attorney for David Costaguta, Marcos A. Algiers, Alejandro Sassoli and Eugenio Ottolenghi, composing the partnership of David Costaguta & Company, entered his special appearance for said defendants solely for the purpose of applying to the Court for an order (1) setting aside the service of subpoena by the Marshal on March 10, 1920, as to them; (2) for an order vacating the order for service

on them by publication made on March 16, 1920 (Rec., p. 352).

On the same day, March 23, 1920, the said Walter H. Merritt, as attorney for the said non-resident parties, obtained from the said District Judge an order to show cause, returnable on March 26, 1920, (1) why the Marshal's return (Rec., p. 36) of service of the subpoena on March 10, 1920, on the said non-resident defendants by serving Leon Grumet, their agent, should not be vacated and declared annulled on the ground that the defendants were not found within the district and could not be so served legally with subpoena, and (2) why the order for service by publication on said defendants and requiring them to plead, answer or demur, made by Judge Hand on March 16, 1920, should not be vacated, on the ground that the action was not an action "to enforce any legal or equitable lien upon or claim to, or to remove any encumbrance or lien or cloud upon the title to real or personal property" within the Southern District of New York, and the Court was without jurisdiction to make such order, and could give no judgment except *in personam* against the said defendants, of whom it lacked personal jurisdiction (Rec., p. 124).

Attached to said rule *nisi* was an affidavit of Leon Grumet, stating in substance that his agency for said David Costaguta & Company was so limited in his power of attorney as not to authorize his receiving service for them (Rec., p. 129).

#### THE HEARING BEFORE JUDGE HAND IN THE DISTRICT COURT.

The hearing on the several motions to show cause and motions made by the respective parties, as hereinbefore stated, came on to be heard before Judge Hand in said District Court and

all questions made by the respective parties were heard together. In addition to the bill of complaint and moving affidavits, the several orders of Court made on the different motions of the respective parties, as hereinbefore mentioned, and Marshal's returns, and appearances, the following papers and documents were offered by the respective parties and received by the Court :

On behalf of the defendant the American-European Trading Corporation and Renado Taffell :

(1) The affidavit of Leon Grumet, president of the said corporation since its organization in February, 1920, with exhibits, in the nature of an answer on the merits to the averments of the bill (Rec., p. 133).

(2) The affidavit of Manuel Garza-Eldape, an attorney of the Republic of Mexico, resident of New York, who undertakes therein to testify as to what the law of Argentine is as to the construction of the copy in Spanish of the contract of November 1, 1917, between the plaintiff and David Costaguta & Company (Rec., p. 162).

(3) The affidavit of Arthur Manly (Rec., p. 165) as to the English translation of the said contract of November 1, 1920, Exhibit B (Rec., p. 82), which is stipulated by all parties to be a correct literal translation (Rec., p. 270).

And on behalf of the plaintiff, in addition to the bill of complaint and moving affidavits and papers and record, there was offered :

(1) The affidavit of Anna G. Saft, bookkeeper in New York of the co-partnership of plaintiff and David Costaguta & Company, and of the latter until February 17, 1920, when the American-European Trading Corporation was organized, with exhibits (Rec., p. 177), the effect of which was to trace through bank accounts by deposits and checks the funds of the co-partnership, or hosiery department,



collected to the amount of \$44,404.16 from sales in New York into the 9091 hides, title to which was transferred by David Costaguta & Company to the American-European Trading Corporation in February, 1920, and admittedly now held by the latter in the district.

(2) The affidavit of plaintiff in reply to the affidavit of Leon Grumet, &c. (Rec., p. 187), with exhibits.

#### THE OPINION OF JUDGE HAND.

On April 7, 1920, Judge Hand rendered and filed his opinion (Rec., p. 223). His Honor delivered his opinion under two heads:

(1) On the motion for a receiver and an injunction, which he denies; and

(2) On the motion to dismiss the service and vacate the order for substituted service, which he grants.

No decree was then entered, and it was not clear from the opinion what order or decree the Court intended to enter, or whether its conclusions had been reached on jurisdictional grounds or not, and the Court left it to the defendants to present and serve plaintiff with appropriate orders. The defendants' attorneys respectively then served plaintiff with two drafts of proposed orders, which appear in the record as "A," page 235, and "B," page 238, to which plaintiff's solicitors filed their objections and exceptions on the several grounds, among others, that the vacation of the orders for service by publication and the dismissal of plaintiff's bill on such motions would deprive the plaintiff of his constitutional right to have his day in the court provided for by law, and would deprive him of his property without due process of law.

## THE DECREES DENYING RELIEF, VACATING SERVICE AND PUBLICATION AND DISMISSING THE BILL.

The learned District Judge signed the decrees as so drafted by the defendants' solicitors on April 10, 1920 (Rec., p. 241, and Rec., p. 244).

### THE APPEAL OF PLAINTIFF.

On April 10, 1920, the plaintiff presented his petition for appeal to this Court (Rec., p. 249), which was allowed by Judge Hand (Rec., p. 247).

"Upon the ground that the bill of complaint was dismissed for want of jurisdiction and that this Court, on the bill, has no jurisdiction of the subject matter and of the persons mentioned therein."

### CERTIFICATE OF DISTRICT JUDGE.

The certificate of the Judge made on the same day. (Rec., p. 251) refers to said decrees vacating the order for service by publication and dismissing the bill, and states:

"I hereby certify that said decrees were entered solely because the case as made by the bill did not set forth a legal or equitable claim to or lien on the property in the District, of which this Court would have jurisdiction within the meaning of Section 57 of the Judicial Code, or in which this Court could render a judgment otherwise than a judgment *in personam* against the non-resident aliens who appeared specially and objected to the jurisdiction of the Court."

### THE ASSIGNMENTS OF ERROR.

The assignments of error filed with the appeal are set forth at large in the record (p. 757). Briefly stated, they are that the Court erred in said decrees:

(1) In holding that the plaintiff by his bill did not assert a legal or equitable title or lien to property in the district.

(2) In holding that the claim asserted in the bill could only be enforced by a personal judgment against the non-residents and not by decree operative against the property in the district.

(3) In vacating the order of March 16, 1920, for service of the said order upon the resident defendants in charge in the district of the property of the non-resident defendants, and declaring everything done under the order void.

(4) In vacating the order for service on the non-resident defendants by publication, depriving plaintiff of his constitutional right to invoke and have exercised the jurisdiction of the Court, and depriving the plaintiff of his property rights without due process of law.

(5) In dismissing the bill as to the non-resident defendants for want of jurisdiction.

(6) In dismissing the bill as to the non-resident defendants for alleged failure to set forth a cause of action of which the Court had jurisdiction.

(7) In dismissing the bill as to the resident defendants for want of jurisdiction.

(8) In dismissing the bill as to the resident defendants for alleged failure to set forth a cause of action of which the Court had jurisdiction.

(9) In dismissing the bill as to the resident defendants because the non-resident defendants were indispensable parties in person to give the Court jurisdiction over the resident parties.

(10) In dismissing the bill for want of jurisdiction before the time fixed in the order of publication for the defendants to plead, answer or demur.

(11) In dismissing the bill for want of jurisdiction as to the resident defendants on affidavits submitted by them going to the merits of the cause of action on a special appearance limited to the question of jurisdiction.

(12) In that the dismissal of the bill for alleged want of jurisdiction on interlocutory hearing deprive the plaintiff of his right to have the property on which he claims a lien conserved and protected on appeal to this Court or the Court of Appeals from interlocutory orders.

(13) In that said decrees unlawfully deprive the plaintiff of his constitutional right to invoke the jurisdiction of the District Court in the controversy in this cause by the methods and processes provided by law, whereby he is entitled to invoke and make the jurisdiction of the Court effective by such processes and means as will protect his property rights as well as his rights as a citizen of the United States to litigate said claim in said Court.

(14) In that in and by said decrees the Court refused, on account of alleged want of jurisdiction, to give the plaintiff the protective relief prayed by restraining order, injunction and receiver, to protect and conserve the property in the district *pendente lite*, and to allow the controversy to proceed in due course of equity proceedings, and thereby the Court in advance of the time and stage of the proceedings at which such rights of the parties could be lawfully finally adjudicated, deprived itself of jurisdiction to enforce plaintiff's rights as to the *res* in said controversy, and so deprived plain-

tiff of his constitutional right of due process of law.

## POINTS.

### I.

**The District Court had general jurisdiction of the parties.**

The suit is of a civil nature in equity and is brought in the Southern District of New York by a citizen and resident of the State of New Jersey against four defendants who are non-resident aliens, one defendant who is a resident alien, and one defendant who is a corporation organized under the laws of New York.

It is within the constitutional grant of power (Art. III, Sec. 2). It is within the original jurisdictional powers conferred on the District Court by Section 24 of the Judicial Code.

In *Ryan v. Ohmer*, 233 Fed. 165, Judge Mayer, sitting in the District Court for the Southern District of New York, held (head-note):

"Under Judicial Code (Act March 3, 1911, c. 231), Sec. 24, 36 Stat. 1091 (Comp. St. 1913, Sec. 991), declaring that the District Court shall have original jurisdiction of all suits of a civil nature between citizens of different states, or between citizens of a state and foreign states and subjects or citizens, the District Court has jurisdiction of a suit wherein a citizen of one state was plaintiff, and a citizen of another and a subject of a foreign power were defendants."

The opinion of Judge Mayer in the case last cited is convincing and reviews the authorities on the

question pro and con and concludes with the following observations (p. 167):

"An analysis of the reasoning which has led the various courts and text-book writers to come to their conclusions will not be profitable. The question will continue to be one as to which marked differences of opinion will exist until the Supreme Court has occasion to construe the statute. Of course, the question is close, and, ordinarily, a doubt will be resolved against jurisdiction; but as between the narrow view, well supported by close reasoning, and the broader view, which seeks to escape too fine a distinction, I choose the latter. I do this the more willingly because a reading of the complaint suggests to me that a considerable delay incident to the settlement of the question of jurisdiction might do injustice to plaintiff in denying to him an opportunity to obtain his relief promptly, if he is entitled to it.

The motion to dismiss is denied."

See also:

*Baker & Bro. v. Pinkham et al.*, 211 Fed. 728.

In *Roberts v. Pacific, &c., Co.*, 121 Fed. 785, the Circuit Court of Appeals, 9th Circuit, held (head-note)

"In a suit by a plaintiff, who is a citizen of the state where it is brought, against two defendants, the fact that one is a citizen of a different state, and the other an alien, does not deprive a federal court of jurisdiction, nor prevent a removal from a state court under the judiciary act of 1887-88 (Act March 3, 1887, 24 Stat. 552, as amended by Act Aug. 13, 1888, 25 Stat. 433, U. S. Comp. St. 1901, p. 507), where either defendant might have removed the suit if sued alone, and they join in the petition for removal."

The judicial power vested in the Courts of the United States by Section 2 of Article III of the Constitution extends to controversies "between citizens of different states; \* \* \* and between \* \* \* citizens (of a state) \* \* \* and foreign \* \* \* citizens or subjects."

This Court has definitely settled that the judicial power as so conferred by the Constitution in the above-quoted language is not limited to suits in which all the controversies in such suits are wholly between citizens of different states or wholly between citizens of a state and foreign citizen or subjects, but the existence in the suit of one separate controversy over which the express power exists carried the power to take jurisdiction of the whole suit.

Barney v. Latham, 103 U. S. 215 (and repeated adjudications).

The question then is simply whether Congress has conferred jurisdiction on the District Court by Section 24 of the Judicial Code. The pertinent provisions of that section provide that the District Court shall have original jurisdiction:

"First, of all suits of a civil nature, at common law or in equity, \* \* \* where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of three thousand dollars, and \* \* \* (a) (Federal question clause) or (b) is between citizens of different states, or (c) is between citizens of a state and foreign states, citizens, or subjects."

Clauses (b) and (c) are substantially in the language of the judicial power described in Article III, Section 2, of the Constitution. The only structural difference is the use of the disjunctive "or" in the place of the semi-colon in the two clauses.

The question made is, in any civil suit involving the jurisdictional amount brought by a citizen of one state against a citizen of another state and against an alien, has the District Court been given original jurisdiction by Section 24, notwithstanding that the jurisdiction as to one set of defendants is under clause (b) and the other under clause (c)? We think that the question is answered in the provisions of Section 28 of the Judicial Code itself. It is there provided:

“\* \* \* Any other suit of a civil nature, at law or in equity, of which the District Courts are given jurisdiction by this title \* \* \* may be removed into the District Court.”

In other words, the only removable suits of a civil nature are those of which the District Courts are given original jurisdiction by Section 24.

It is therein also provided (Sec. 28):

“And when in any suit mentioned in this section there shall be a *controversy which is wholly between citizens of different states, and which can be fully determined as between them*, then either one or more of the defendants actually interested in *such controversy*, may remove said suit into the District Court of the United States for the proper district.”

Then follows the provision:

“And where a suit is now pending, or may hereafter be brought in any state court, in which there is a controversy between a citizen of the state in which the suit is brought and a citizen of another state, any defendant, being such citizen of another state, may remove such suit into the District Court of the United States for the proper district, at any time before the trial thereof; \* \* \*



(when local prejudice is made to appear, &c.):

*Provided*, That if it further appear that said suit can be fully and justly determined as to the other defendants in the state court, without being affected by such prejudice or local influence, and that no party to the suit will be prejudiced by a separation of the parties, said District Court may direct the suit to be remanded, so far as relates to such other defendants, to the state court, to be proceeded with therein."

The suits on which this proviso could operate could only be suits in which there are "separable controversies," or, in the language of the proviso, a suit in which there could be a "separation" without "prejudice" to the rights of the parties. The use in the proviso of the words "as to the other defendants" and "so far as relates to such other *defendants*" carries the provision back to the separable controversy clause, in which only "other" defendants are mentioned, as contradistinguished to the defendant being such citizen of another state in the separate controversy wholly between citizens of different states.

Considering the judicial history of these removal provisions, there can be no doubt that it was the intent of Judicial Code provisions in Section 28 to allow the removal by defendants of suits in which there were separable controversies, one of which controversies is wholly between citizens of different states, and the other controversy between the plaintiff and the "other defendants" and which need not be between citizens of different states. (*Barney v. Latham*, 103 U. S. 215.) But with the limitation that the suit as a whole must be one of which the Court is given jurisdiction by Section 24. Now, if the Court cannot acquire original jurisdiction of such a suit except it be wholly between citizens of

different states, or wholly between a citizen of a state and aliens, the cases provided for in the proviso would be wholly lacking, and the proviso would be meaningless. The clear intent of the proviso was to allow the remanding of all such controversies, not being the separable controversy wholly between citizens of different states, so removed if it can be done without prejudice.

In the case at bar, the main controversy is between the plaintiff and the alien defendants for an accounting and to enforce a partnership lien on property in the district, large, separate parts of which are in the district not transferred to nor in the possession of the American-European Trading Corporation, the New York corporation, and the other part, as averred in the bill, transferred by the alien defendants to the said New York corporation without other consideration than the issue of all the capital stock of the latter, aggregating \$10,000, to members of the firm of David Costaguta & Company, all alien defendants, while assets of said Hosiery Section co-partnership, which were in process of liquidation, aggregating more than \$200,000 in value, were so transferred to said corporation organized by the said alien defendants to receive and place the same beyond the reach of the plaintiff by legal process.

It is true that Leon Grumet, president of said corporation, has filed an affidavit to the merits admitting the said ownership of stock, but denying that the transfers were without consideration. But he substantially admits (Rec., p. 155) that the said corporation was organized to place the assets of the said alien defendants beyond the reach of attachments. The affidavit of Grumet was fully refuted by the counter-affidavits put in by the plaintiff.

We apprehend that as the appearances were special to the jurisdiction, and the lower Court dis-

posed of the case on the question of jurisdiction, the allegations of the bill in that respect must be taken as true for the purposes of this appeal. The allegations of the bill make the American-European Trading Corporation a mere agent or holder of title of personal property for the said alien defendants. So that if the bill had been filed alone against the alien defendants, and a receiver had been appointed of the co-partnership assets, service of the order of publication and restraining orders would have bound the corporation as a person in possession under Section 57 of the Judicial Code, even though it had not been made a formal defendant. And in such case the receiver, if the facts averred in the bill were undisputed on the merits, could have recovered possession of said assets by summary process (*Mueller v. Nugent*, 184 U. S. 1-15), or otherwise on plenary action.

The case against the alien defendants was a complete separable controversy for accounting and administration of assets of a co-partnership in process of liquidation, and that could have been completely determined between the parties without the presence of the American-European Trading Corporation, interested only in a portion of the assets.

In *Barney v. Latham*, 103 U. S. 205, the suit was by plaintiffs, citizens respectively of Minnesota and Indiana, and the individual defendants were citizens respectively of New York, Wisconsin and Massachusetts, and the defendant corporation was a citizen of Minnesota. The plaintiffs and the individual defendants were jointly owners of undivided interests in certain lands, the legal title to which it was in the power of the individual defendants to convey. The individual defendants organized a land corporation and conveyed all the lands to it, without the consent of the plaintiffs and, as charged in the bill, in fraud of the plaintiffs' rights, and appropriated the other and

additional joint assets and refused an accounting. The individual defendants denied all the material allegations of the bill. The defendant land company admitted the conveyance to it had been made "without consideration by it paid," and "that the stock therein is all held by its co-defendants and the heirs or personal representatives of D. N. Barney."

The Court said:

"The complaint, beyond question, discloses more than one controversy in the suit. There is a controversy between the plaintiffs and the Winona and St. Peter Land Company, to the full determination of which the other defendants are not, in any legal sense, indispensable parties, although, as stockholders in the company, they may have an interest in its ultimate disposition. Against the latter, as a corporation, a decree is asked requiring it to convey to the plaintiffs an undivided two-ninths of one thirty-seventh of certain lands, and to account for the proceeds of the lands by it sold subsequently to the conveyance from the railroad company.

But the suit as distinctly presents another and entirely separate controversy, as to the right of the plaintiffs to a decree against the individual defendants for such sum as shall be found, upon an accounting, to be due from them upon sales prior to the conveyance from the railroad company. With that controversy, the land company, as a corporation, has no necessary connection. It can be fully determined as between the parties actually interested in it without the presence of that company as a party in the cause. Had the present suit sought no other relief than such a decree, it could not be pretended that the corporation would have been a necessary or indispensable party to that issue. Such a controversy does not

cease to be one wholly between the plaintiffs and those defendants because the former, for their own convenience, choose to embody in their complaint a complete controversy between themselves and the land company. When the petition for removal was presented, there was in the suit, as framed by the plaintiffs, a controversy wholly between citizens of different States, that is, between the plaintiffs, citizens, respectively, of Minnesota and Indiana, and the individual defendants, citizens of New York, Wisconsin and Massachusetts. And since the presence of the land company is not essential to its full determination, the defendants, citizens of New York, Wisconsin and Massachusetts, were entitled, by the express words of the statute, to have the suit removed to the Federal Court."

And the Court said:

"A defendant may be a proper but not an indispensable party to the relief asked."

While the general rule is that fundamental jurisdiction is dependent upon the conditions at the beginning of the suit, the rule does not necessarily apply to the citizenship of parties who may be made defendants but who are not indispensable parties, or matters which can be waived.

In *Ladew v. Tenn. Copper Co.*, 179 Fed. 245, the plaintiffs were citizens of New York and West Virginia, and the defendants were, respectively, corporations of New Jersey and of Great Britain. The suit was to abate a nuisance created by property located in the district. Separate motions to dismiss were made: (1) By the New Jersey corporation on the ground that the Court had no jurisdiction because an action to abate a nuisance was not within the 8th Section of the Act of 1875 (embodied in Section 57 of the Judicial Code); and (2) by the English corporation upon the ground

that the Court had no jurisdiction because a citizen cannot sue a citizen and join an alien defendant in the same action. The Court granted the former motion and dismissed the bill as to the New Jersey corporation. But it refused to grant the latter motion, holding (p. 256) that a just construction of the Act under the weight of authority would allow such joinder.

The order dismissing the bill against the New Jersey corporation for want of jurisdiction was appealed by the plaintiff to this Court and affirmed.

Ladew v. Tenn. Copper Co., 218 U. S. 357.

Although in that case if the joinder of the New Jersey corporation and British corporation, as defendants, was not authorized by the statute, it would have made a case of want of fundamental jurisdiction on the face of the bill in the Trial Court of which this Court would have been called upon, *sua sponte*, to dismiss the bill on that ground, and although the point was called to this Court's attention in the record, it confined its discussion entirely to the question of the existence of a lien, and in affirming did not allude to the other question except as follows (p. 364) :

"The Court, speaking by Judge Sanford, *who delivered a well-considered opinion in the case*, sustained the motion of the Tennessee Copper Company, and dismissed the bill as to it. The motion of the British company was overruled, the Court held that it had jurisdiction over the alien corporation."

We think that this was intended substantially as an approval of Judge Sanford ruling on both questions.

None of the defendants in the present case filed any pleadings raising the question of any mis-

joinder of the two separable causes of action, in each of which, separately considered, the Court without question was given jurisdiction by Section 24 of the Judicial Code, and the decrees of dismissal and certificate of the Judge show that the alleged want of jurisdiction was not predicated upon any other ground than that the action did not set forth a lien or claim within the meaning of Section 57.

## II.

**The relation and liability of partners to their creditors and as between themselves in a business contemplated to be carried on in more than one country are questions of general commercial law.**

For the purpose of protecting creditors the laws of Argentine or any other state might require that special partnerships shall register and advertise their partnership contracts under penalty that no limited liability shall be recognized as between them and third persons. But the partnership relation is not one created by statutory law, it is as old as the Roman law itself, and depends upon the fact of the relation and not upon the name which may be given to it in any particular state.

In *Lindley on Partnership*, Law Library edition, p. 69, star. p. 7, the definitions of partnership from *Ces Lois Civiles*, *Grot. LeDroit de la Guerre et de la Paix*, *Pothier*, etc., are summarized. So in 3rd *Kent's Commentaries*, Section 24, it is pointed out that the relationship and mutual rights and liabilities have been recognized in all civilized states. And it is there stated under the civil law of Spain that "partnerships may be formed as in the English Law, tacitly as well as expressly." It was there shown

that the relation of partnership and its definitions and qualities were in substance the same the world over.

Where a contract entered into in Buenos Aires between citizens of that state and an American citizen and Italian and French citizens, which contemplates operations in buying and selling, both in Buenos Aires and the United States and elsewhere, the creation of liabilities to third persons in foreign countries, the sharing of losses and gains, the rights of each of the parties to have the community assets applied to the creditors and to a control in the division of assets, and a question arises over assets in the United States, the Courts here will apply the law of the forum as a question of general commercial law, and will not be bound by the laws of Argentine so far as it affects such property situate in this country.

In *Liverpool Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397, the question arose over the validity of a limitation of liability in a contract of affreightment made in New York for shipment to Liverpool, the Court said (p. 443) :

"It was argued for the appellant, that the law of New York, the *lex loci contractus*, was settled by recent decisions of the Court of Appeals of that state in favor of the right of a carrier of goods or passengers, by land or water, to stipulate for exemption from all liability for his own negligence. *Mynard v. Syracuse Railroad*, 71 N. Y. 180; *Spinetti v. Atlas Steamship Co.*, 80 N. Y. 71.

But on this subject, as on any question depending upon mercantile law and not upon local statute or usage, it is well settled that the courts of the United States are not bound by decisions of the courts of the State, but will exercise their own judgment, even when their jurisdiction attached only by reason of the citizenship of the parties, in an action at



law of which the courts of the State have concurrent jurisdiction, and upon a contract made and to be performed within the State."

"It was also argued in behalf of the appellant, that the validity and effect of this contract, to be performed principally upon the high seas, should be governed by the general maritime law, and that by that law such stipulations are valid. To this argument there are two answers:

First. There is not shown to be any such general maritime law. The industry of the learned counsel for the appellant has collected articles of codes, decisions of courts and opinions of commentators in France, Italy, Germany and Holland, tending to show that, by the law administered in those countries, such a stipulation would be valid. But those decisions and opinions do not appear to have been based on general maritime law, but largely, if not wholly, upon provisions or omissions in the codes of the particular country; and it has been said by many jurists that the law of France, at least, was otherwise."

"The rule that the courts of one country cannot take cognizance of the law of another without plea and proof has been constantly maintained, at law and in equity, in England and America."

The Court then quotes with approval Mr. Justice Willes in *Lloyd v. Guibert*, L. R. 1 Q. B. 115, 129, as follows:

"In order to preclude all misapprehension, it may be well to add, that a party who relies upon a right or an exemption by foreign law is bound to bring such law properly before the court, and to establish it in proof. Otherwise the court, not being entitled to notice such law without judicial proof, must proceed according to the law of England."

In *Walworth v. Harris*, 129 U. S. 355, the case arose over a conflict of the laws of Arkansas and of Louisiana, each of the parties claimant having valid contract liens in their respective states, but the legal contest arising in Louisiana, where the cotton was. After reviewing numerous authorities the Court said, reviewing its own previous decision (p. 364) :

"and while it was seen that in many cases it had been held that a court of one State would give effect to the law of domicile of another State, it was said: 'But after all, this is a mere principle of comity between the courts, which must give way when the statutes of the country, where property is situated, or the established policy of its laws prescribe to its courts a different rule.' "

"The municipal laws of a country have no force beyond its territorial limits, and when another government permits these to be carried into effect within her jurisdiction, she does so upon a principle of comity. In doing so, care must be taken that no injury is inflicted upon her own citizens, otherwise justice would be sacrificed to comity. \* \* \* If a person sends his property within a jurisdiction different from that where he resides, he impliedly submits it to the rules and regulations enforced in the country where he places it." See also *Olivier v. Townes*, 2 Martin (N. S.) 93; *Denny v. Bennett*, 128 U. S. 489.

In *Chatenay v. Brazilian Submarine Tel. Co.*, (1897), 1 Q. B. 79, the Court said :

"One inference which has been always adopted is this: if a contract is made in a country to be executed in that country, unless there appears something to the contrary, you take it that the parties must have intended that that contract, as to its construc-

tion, and as to its effect, and the mode of carrying it out (which really are the result of its construction), is to be construed according to the law of the country where it was made. But the business sense of all business men has come to this conclusion, that if a contract is made in one country to be carried out between the parties in another country, *either in whole or in part*, unless there appears something to the contrary, it is to be concluded that the parties must have intended that *it should be carried out according to the law of that other country*. Otherwise a very strange state of things would arise, for it is hardly conceivable that persons should enter into a contract to be carried out in a country contrary to the laws of that country. That is not to be taken to be the meaning of the parties, unless they take very particular care to enunciate such a strange conclusion. Therefore the law has said, that if the contract is to be carried out in whole in another country it is to be carried out wholly according to the law of that country, and that must have been the meaning of the parties. *But if it is to be carried out partly in another country than that in which it is made, that part of it which is to be carried out in that other country, unless something appears to the contrary, is taken to have been intended to be carried out according to the laws of that country."*

See also the very able opinion of Brown, J., in *The Brantford City*, 29 Fed. 373.

In *Watts v. Camors*, 115 U. S. 353, the Court said:

"Americans and Englishmen entering into a charter-party of an English ship for an ocean voyage, must be presumed to look to the general maritime law of the two countries, and not to the local law of the state in which the contract is signed."

So in the case at bar, the plaintiff, a citizen of the United States, who had been conducting a similar business in New York, entered into a partnership with a citizen of Argentine, another of France and two of Italy, by which the operations of the co-partnership were to be and were conducted in South America, Europe and in the United States in the buying and selling of merchandise. There is nothing in the contract showing an intent to have it construed by Argentine law, and the presumption must be that the general commercial law was to control.

### III.

**There was no competent evidence offered by the defendants that a partnership between the plaintiff and the members of David Costaguta & Company did not exist under the laws of Argentine.**

The affidavit of Manuel Garza-Aldapa for defendants (Rec., p. 162) indicates that he is a native of Mexico, an attorney at law, and admitted to the bar of Mexico. He qualifies himself as follows and says: "I am well acquainted with the civil law in force in Spanish America. I have made a special study of the laws of the Argentine Republic, and I am well acquainted with the same." He then states:

"I have carefully examined a Spanish copy of the contract made at Buenos Aires, Argentine Republic, November 1st, 1917, between David Costaguta & Company and Henry S. DeRees. This contract does not constitute a partnership under the Argentine law for the following reasons."

He then gives a number of reasons for his conclusion, which he says is based on Argentine law. Some of his conclusions apparently are based upon statutes which he does not set out, some evidently are based upon the unwritten law, and no authority of any kind is cited or quoted.

The affidavit as a whole does not state the law as a fact, but amounts simply to a judicial opinion by a man who it does not appear ever was in Argentine, and who makes no claim to have practised in her courts, but simply claims that "I have made a special study of the laws of the Argentine Republic" and "am well acquainted with the same."

"An Englishman describing himself as a 'certified special pleader' and 'familiar with the Italian law' was held incompetent to prove it."

In re Bonelli, 1 P. D. 69-45, L. J. P. & Adm., 42-44 Wkly. Rep. 255.

"A member of the English bar practicing before the Privy Council is not as of course an expert to give evidence concerning the laws of those countries for which the Privy Council is the ultimate court of appeal."

Cartright v. Cartright, 26 Wkly. Rep. 684.

"One who has acquired his knowledge by mere study is incompetent."

Idem.

Bristow v. Sequeville, 5 Exch. 275.

14 Jur. 674-19, L. J. Exch. 289.

16 Cyc. 887.

The written laws of a foreign country must be proved by the best evidence of which the nature of the case is susceptible and no testimony will be received which presupposes better testimony attainable by the party who offers it. In general authenticated copies of written laws are expected to be produced.

Ennis v. Smith, 14 How. 400.

See also Story's Conflict of Laws 525 and numerous decisions cited in notes to *Ennis v. Smith*, 14 How. 400 (14 Bk. Coop. Ed. 472).

It is only the unwritten laws which can be proved by an expert.

Item.

In *Slater v. Mexican N. R. R. Co.*, 194 U. S. 120, the Mexican statutes relied upon by the parties were proved and translations submitted, after which the deposition of a Mexican lawyer as to the accepted construction by the Mexican courts was offered. On this point Mr. Justice Holmes for the Court said (p. 130):

"The defendant offered the deposition of a Mexican lawyer as to the Mexican law. This was rejected, subject to exception, seemingly on the ground that the agreed translation of the statute was the best evidence. *So no doubt, they were, so far as they went*, but the testimony of an expert as to the accepted or proper construction of them is admissible upon any matter open to *reasonable doubt*."

In the case at bar the affiant, not an Argentine lawyer, undertakes to testify that the contract "is not drawn up in the form required for partnership articles by Article 291 of the Code of Commerce of the Argentine Republic," without quoting the article, so that the Court can for itself determine what the effect of the statute is. Whether it is merely a permissible or directory form, or whether it is one to protect creditors against silent partners, or whether it affects in any respect the liability and rights of partners as between themselves. The affidavit is utterly incompetent and should not have been considered on such a proceeding as this, where the witness is not even exposed to cross-examination.

## IV.

**The plaintiff and the individual members composing the firm of David Costaguta & Company were and are co-partners with all the rights and privileges to which that relationship gives rise.**

In his opinion (Rec., p. 225) his Honor Judge Hand expressed a doubt as to whether there existed a co-partnership under the contract of November 1, 1917, at all, although he did not put his judgment upon that ground, that doubt appears to have been potential in his taking into consideration the *ex parte* affidavits of defendants going to the merits.

The contract (Exhibit "A," Spanish; Exhibit "B," agreed English translation, Rec., p. 82), annexed to the moving affidavit of the plaintiff, clearly creates a co-partnership between the plaintiff, on the one hand, and David Costaguta, Marcos A. Algiers, Alejandro Sassoli and Eugenio Ottolenghi, on the other.

Briefly analyzed, the contract provides (Art. 1) that a special section to be known as the "Hosiery Section" shall be established on the premises and in the name of David Costaguta & Company "for the purchase" and "sale" of hosiery and knitted goods in the City of Buenos Aires *and elsewhere*, as may be agreed upon, which the plaintiff was "to direct and have charge of," thus expressing and implying that the plaintiff was to have exclusive charge of both the purchases and the sales of the goods of the section.

By Article 2 David Costaguta & Company reserved the right to "pass on and fix the credits and conditions of sale," and by Article 3 to have submitted to them for approval "the arrangements of purchases" while the plaintiff was in Buenos Aires,

"whereas, when he goes to North America or Europe to make purchases he shall have complete liberty of action within the sums which Mess. David Costaguta & Company may fix in writing."

By Article 4 it was provided that certain specific expenses directly belonging to it, such as the salaries of the employees of the section, shall be charged to it, whereas other expenses, such as rent, light, heat, salaries of bookkeepers, etc., should be charged exclusively to the account of David Costaguta & Company, therefore contemplating that the section as such should and did have a separate and distinct character and entity with its own employees, of whom the plaintiff was, by Article 1, "to have charge" of. And there were to be books kept for that business on which David Costaguta & Company were to have an account of debits and credits.

There was ample provision therefore for the plaintiff to make the sales by himself and the employees of the section when he was in Buenos Aires, and for the sales to be made by the employees of the section when he was absent, under his directions however given, the contract contemplating his absence to make the purchases or sales, but reserving no control by Costaguta & Company over the direction and control of the business other than as limited by the express terms of the contract.

By Article 5 it was provided that on October 31st of each year a "balance shall be struck, and the deductions which shall be deemed advisable to make in the merchandise, as well as in the credits, shall be determined by common accord" between David Costaguta & Company and the plaintiff. This clearly contemplates that at such annual periods when balances shall be made both parties should be considered as having an interest "in the merchandise" as well as "in the credits" which could not be



divested and the whole interest shifted into one party except by "common accord." It also necessitated that the merchandise and accounts of the "Hosiery Section" should be kept segregated from that of any other business of David Costaguta & Company.

Article 5 further provides: "From the resulting profits (of the section) there shall be deducted 6% annual interest on the capital which David Costaguta & Company may have supplied to the section." The calculation of interest on the capital advanced "shall be made every six months, an account current being established with disbursements and receipts of funds (meaning as between Costaguta and the section), and, in case the earnings of the fiscal period do not cover the interest, the balance will be passed to the following period."

Article 5 further provides that after taking account of interest and capital advanced "the remainder shall be distributed in the following proportions:

*"55% to Messrs. David Costaguta & Company and 45% to Mr. DeRees; the losses shall be borne in the same proportion."*

Here we have an agreement for a division of both profits and losses of the "section" between the parties, which established the relation of partnership, and it is to be observed that the plaintiff's interest in the profits is not in lieu of compensation for services, but a community interest in the profits as profits and an obligation to pay losses, if any, sustained.

In the clause above quoted as to "distribution" of the profits, it is not specified by whom the "distribution" is to be made, but, by the first clause of this article, above quoted, clearly it could not be made otherwise than by the "common accord" which is the rule in all contracts of partnership.

Article 6 provides for a monthly drawing account for the plaintiff "which shall be charged to his personal account." This clearly would mean that the money was to be withdrawn from the moneys of the "section" as an advance on his share of the profits at the end of the fiscal year. Nothing is said in this clause as to whether he was to be charged with interest on the items so withdrawn on said drawing account.

Article 7 provides :

"Mr. DeRees may withdraw his share of the profits, only to the amount of fifty per cent, being under the obligation to leave the balance on deposit with Messrs. David Costaguta & Company, drawing an annual interest thereon at 6%."

This provision is not one in relation to all the funds of the section. It relates to the plaintiff's profits ascertained and distributed at the annual settlement periods. The use of the words "leave," "on deposit with Messrs. David Costaguta & Company" might raise the implication that this as well as the general funds of the section were to be kept on deposit even before distribution in that "house." This implication does not necessarily follow, however, because the half of the plaintiff's share of the profits was not, after such annual division of profits, to be "left" in any account of the moneys of the section, but to be on deposit as a special fund in which he individually was interested and on which he individually got interest. That individual deposit could only serve as security to Costaguta & Company during the continuance of the contract for the faithful performance by the plaintiff of his part of the contract, but could not be forfeited for an infraction by the plaintiff of the contract in the particulars

provided for in Article 8, as the right of forfeiture is limited to the plaintiff's share of the profits of the current year in which the specified infractions occur, and therefore could not apply to that left on deposit at the end of the preceding year.

The contract is silent as to where the operating funds of the co-partnership were to be kept on deposit. As interpreted by the acts of the parties as set forth in the bill and moving affidavit, the cash receipts in Buenos Aires were deposited with David Costaguta & Company, and those in New York with banks in New York, sometimes in the name of plaintiff and sometimes in the name of David Costaguta & Company, but for the account of the "Hosiery Section." But it is very clear from the provisions of Articles 4 and 5 that all of the merchandise and accounts were to be kept separate from others in which David Costaguta & Company were interested, and from those provisions that the funds of the co-partnership when so deposited with David Costaguta & Company were to be held precisely as a bank would hold them for a customer on deposit, and subject to account and pay-over at the annual adjustments provided for in Article 5.

Article 8 imposed the obligation upon the plaintiff (1) to give all his activity to the business of the section; (2) not to participate in other commercial business; (3) not to be interested in any other matter foreign to the "section" and for breach of any of those provisions it gives the right to Costaguta & Company "not to recognize in favor of DeRees the profits which are earned during the fiscal period in which the violation has taken place." "Fiscal period" is used in Article 5 as synonymous for the year from October 31 to October 31. Therefore Article 8 means the right to

forfeiture of the profits of any fiscal year in which the infraction occurs.

If there has been a "common accord" division of profits on the 31st of October of any year it would be a waiver on the part of Costaguta & Company to claim forfeiture for the year in which the adjustment of profits for that year had taken place, as provided in Article 5.

Article 9 is unimportant.

Article 10 provides :

"The parties reserve the right to terminate the present agreement upon notice of 3 months by registered letter."

This requires written notice.

Article 11 provides that *both* parties

"on receiving the notice of termination of the present contract may request the liquidation of the merchandise existing in the house, in the Customs House, in transit, or in course of manufacture, pertaining to this Section, Mr. DeRees obligating himself to give his co-operation up to the moment the liquidation is terminated, and Messrs. David Costaguta & Co. as sole owners of the business shall pay to Mr. DeRees the amount corresponding to him in installments *which are established in the following article.*"

This article deals solely with the status of the parties upon and in the event that three months' notice of termination of the agreement has been given by either party in writing, as provided by Article 10. On the receipt of such notice the plaintiff is to co-operate up to the moment in which the liquidation is terminated. At the moment all of the merchandise wherever situate had been liquidated and the balance between the partners struck by common accord and payment of the first installment made, the further interest of the plain-

tiff in the business was to cease, other than in obtaining other deferred installments fixed by common accord. At that moment it might be that all the credits of the section might not have been collected or liquidated, but their value would have been fixed by common accord, and "the business" was then to become the sole property of Costaguta & Company, and Costaguta & Company "as sole owners of *the business* shall pay to Mr. DeRees" the balance to which he is entitled, the payments to be made "in the installments which are established" in Article 12, the first of which was to be in cash, *i. e., contemporaneously* with the complete liquidation and the determination of the balance, and the passing of sole ownership to Costaguta & Company. That this is the correct interpretation seems clear from Article 12.

Article 12 provides that in case the contract is terminated by either party by the requisite notice pursuant to Article 10 and the preceding article is not applied in so far as it refers to an eventual liquidation of the stock in hand,

*"a balance shall be made, observing with regard to deductions the form indicated in Article 5, and Messrs. David Costaguta & Co. shall take charge of the assets and liabilities, paying the amount which results in favor of Mr. DeRees in four equal installments, the first in cash, and the others in installments of six, twelve and eighteen months, with interest at 6%."*

The words "observing with regard to deductions the form indicated in Article 5" refers back to the connection in which the word "deductions" is used in Article 5. That is to say, as we have already seen, the title to the merchandise as well as the credits was not to be passed from one party to the other except the deductions in value

were reached by "common accord" between them. But when that is made by common accord, then, under the provision of the Article 12 last quoted, the balance and the business, including assets and liabilities, was to be taken over by Costaguta & Company on paying over to the plaintiff the amount to which he would then be entitled. But the payments were to be in installments, payable, the first in cash, and the others in six, twelve and eighteen months. There is nothing in this article which would authorize Costaguta & Company, without the prescribed notice and without the plaintiff's consent and at their own will, to take possession and dispose of the goods belonging to the "section" as their own property without such balance mutually arrived at and paying the cash installment so found due the plaintiff and by the accord obligating themselves to pay the deferred liquidated installments.

Article 13 provides:

"In case of the death of Mr. DeRees Messrs. David Costaguta & Co. will liquidate the stock in hand within the period of one year from the date of death; they will make a balance and pay the heirs of Mr. DeRees the amount which belongs to him, in the installments which are indicated in the preceding article. Interest at the rate of 6% annually will be paid also to the heirs."

It will be observed that this section follows the rule of law applicable to liquidation of a business by one partner on the death of the other, viz.: (a) One year for liquidation; (b) interest on the balance due the heirs after that time, and here by special contract the balance payable in six, twelve and eighteen months, bearing interest at 6 per cent. annually.

There is no doubt under the authorities, in view of the provisions of the contract, that the plaintiff and the members of David Costaguta & Company were co-partners in the business of the special hosiery section conducted in the name of David Costaguta & Company and upon its premises both here and in Buenos Aires. The test of partnership is a community of profit, a specific interest in the profits as profits as contradistinguished from a stipulated portion of the profits as compensation for services.

In *Ward v. Thompson*, 63 U. S. 330, this Court thus states the rule:

“Where the parties have joined together to carry on a certain adventure or trade, for their mutual profit—one contributing the vessel, the other his skill, labor and experience, etc., and there is a communion of profits, on a fixed ratio, it is a partnership.”

In *Berthold v. Goldsmith*, 65 U. S., 536, this Court said:

“Whenever it appears that there is a community of interest in the capital stock, and also a community of interest in the profit and loss, then it is clear that the case is one of actual partnership between the parties themselves and, of course, it is so as to third persons.”

Another definition by this Court is:

“A contract of partnership is one by which two or more persons agree to carry on a business for their common benefit, each contributing property or services, and having a community of interest in the profits. It is in effect a contract of mutual agency, each party as principal in his own behalf and as agent for his co-partner.”

Karrich v. Hannaman, 168 U. S. 334.

Mehan v. Valentine, 145 U. S. 611.

In the case at bar we have all of the ingredients of an actual partnership, capital supplied by the plaintiff at the inception of the relationship (pars. 9th and 12th of the bill), evidenced by the 31,253.99 pesos to the credit of his capital account at the inception of the contract (Rec., p. 95, Exhibit "I"), plus his community interest in the merchandise then on hand, aggregating 302,332.18 pesos (Rec., p. 94, Exhibit "H"). Nor is the question affected by the fact that the business was conducted in the name of David Costaguta & Company, and in Buenos Aires, at least, upon the premises of David Costaguta & Company and that the plaintiff's name did not appear as a partner in the transactions with third persons.

"Persons who are associated in business pursuant to a contract which makes them partners *inter se* are partners as to third persons, even though they have attempted to prevent, or to conceal, the existence of a partnership."

30 Cyc. 382, and cases cited.

See also:

Beauregard v. Case, 91 U. S. 132.

Paul v. Cullum, 132 U. S. 539.

Besides all this, if the contract itself is in this respect in any way ambiguous, the averments of the bill charge that the agreement was a co-partnership, and the acts of the parties set forth in the bill, or which the plaintiff is entitled to have the Court consider on full hearing in the exercise of its jurisdiction, show that the relation was that of co-partnership.



To the opposition affidavit of Leon Grumet, president of the American-European Trading Corporation, there is attached (Rec., pp. 141, 191) as Exhibit "G" a copy of a suit by David Costaguta & Company against one Kitzmiller, verified by H. S. DeRees, September 9, 1919, as agent of David Costaguta & Company, which was apparently offered to set up an estoppel against DeRees, to show that their relationship was that of co-partnership. This was fully explained and met by the counter-affidavit of the plaintiff (Rec., p. 191), and in his affidavit he shows that in the lease of the premises for the Hosiery Section business in New York on March 30, 1918, taken in the name of David Costaguta & Company, he described himself as a member of the firm (Rec., pp. 188, 213). In the suit in question the name of DeRees as a silent partner had not entered into the contract with Kitzmiller, and undoubtedly as a partner he was agent for the other partners and he was entitled to bring suit in the name of the persons in whose name the contract was made.

The New York Code of Civil Procedure, Sec. 44, provides that

"A person, with whom, or in whose name, a contract is made for the benefit of another, is a trustee of an express trust within the meaning of this section,"

which section authorizes suit in the name of the party in whose name the contract was made. The principle is not statutory, but general. But in no sense could estoppel be predicated upon that suit, and as mere declaratory evidence it is more than counterbalanced by the declaration in the lease referred to. The whole matter is of no importance on the question of the denial by the Court of initial jurisdiction in this case.

## V.

**On the termination of the partnership by agreement and entry on liquidation each partner has, and at the time of the commencement of this suit had, an existing and operative lien on the assets of the firm, and particularly on that part of the assets within the district, for whatever is due him from the co-partnership after the payments of its debts.**

The general principle is so well established that no extended references need be made.

"A partner's lien on firm property is not a legal or possessory lien, but an equitable lien; \* \* \*. Indeed *its principal function is performed in preventing the diversion of the firm assets from firm creditors, and after these are paid, in securing an equitable distribution of the balance among the parties.* Accordingly, after firm debts are paid to outside creditors, this lien secures to each partner his share in the balance of the firm assets, as that share is ascertained on the final accounting between the partners."

30 Cyc. p. 453, citing many cases.

"Of course, as in the case of other contracts, a partnership may be dissolved, at any time during the term for which it was organized, by the valid mutual agreement of the partners, including a dormant partner. It may be dissolved also in accordance with the mutual consent of the parties as expressed in the original articles of partnership."

30 Cyc. pp. 651-652, citing many authorities.

The partnership may also be dissolved by judicial decree for various causes.

30 Cyc. p. 656.

In the case at bar the dissolution as set up in the bill, and as is admitted, was by agreement of the parties and in accordance with the terms of the contract of partnership, and was operative from November 22, 1919.

The bill alleges that the plaintiff duly gave the requisite notice terminating the co-partnership as of November 22, 1919, and thereafter gave notice of demand for liquidation of the assets of the co-partnership, in both of which the defendants David Costaguta & Company acquiesced in writing (Rec., p. 17, and Exhibits "K" and "L," Rec., pp. 101-102).

The allegations of the bill show that the assets of the co-partnership were large, with large profits, and the liquidation had been commenced substantially four months before the bill was filed. It does not charge that there were any outstanding debts due by the co-partnership at the time the bill was filed. In the supporting affidavit of plaintiff it is stated (Rec., p. 201) that practically all the purchases of merchandise were made on very short term credits, allowing time for inspection after delivery in New York City, and that there is no outstanding indebtedness of the hosiery section unless it be some small amounts aggregating \$1,000 or some small liabilities for current expenses.

The defendants' solicitors have argued that because there is a prayer in the bill (Rec., p. 26) that the co-partnership be "declared dissolved" that the purpose of the bill was to have a future dissolution declared, and that it asserted no operative lien as of the time of the filing of the bill; that only a

lien to be created by the suit, and not one previously existing and sought to be enforced is asserted. But this is by no means a proper construction of the prayer, which must be interpreted in connection with the allegations of the bill, which set forth an existing state of dissolution by agreement, and the existence (Rec., p. 25) of a present lien.

Upon a dissolution, however arrived at, in general, each partner has the right and duty of disposing of the firm assets for the purpose of winding up its affairs and of distributing the proceeds among the firm creditors and the partners.

30 Cyc. 664.

Ambler v. Whipple, 20 Wall. 546.

Karrich v. Hannaman, 168 U. S. 328.

In the latter case this Court quotes with approval (p. 337) from its previous opinion as follows:

"However the question may be decided, whether one partner may by his own mere will dissolve a partnership formed for a definite purpose or period, it is clear that upon such a dissolution one partner cannot appropriate to himself all the partnership assets, or turn over the share of his partner to another with whom he proposes to form a new partnership."

And this Court further stated (p. 337):

"In a court of equity, a partner who, after a dissolution of the partnership, carries on the business with the partnership property is liable, at the election of the other partner or his representative, to account for the profits thereof, subject to proper allowances."

Where there has been a dissolution, and while the partnership assets are in process of liquidation, the partnership lien is not an inchoate lien or mere

equity capable of being set in operation only by a decree of a court declaring a dissolution for cause, but is an active present right. This is true because on dissolution the agency between the partners is terminated except for the limited purposes of winding up the affairs of the co-partnership.

30 Cyc. 659 and authorities cited.

Where, therefore, one partner under color of his possession as a liquidator is appropriating and transferring the assets in violation of the rights of his co-partner, necessarily the latter must have a present right to immediately assert his lien for the protection of his right in the property itself.

Nor is the fact that the defendants are aliens and absent from the district a reason for denying the plaintiff's relief by injunction and receiver, to protect assets within the jurisdiction, until statutory service by publication can be had.

"By the settled practice of the court in ordinary suits, a receiver cannot be appointed, *ex parte*, before the defendant has had an opportunity to be heard in relation to his rights, except in those cases where he is out of the jurisdiction of the court, or cannot be found; or where, for some other reason, it becomes absolutely necessary for the court to interfere, before there is time to give notice to the opposite party, to prevent the destruction or loss of property."

Verplanck v. Mercantile Ins. Co., 2 Paige (N. Y.) 450.

Mann v. Gaddie, 158 Fed. 42, 5th Cir.

Einstein v. Schnebly, 89 Fed. 540.

Watson v. Bettman, 88 Fed. 825.

In the case at bar the Court had, on the bill and moving affidavits, issued a temporary restraining

order restraining the disposition of the assets within the jurisdiction of the Court until a hearing could be had, and which had been made effective by service by the Marshal on the persons in possession of said property of the co-partnership.

This order was by the decree of the Court (Rec., p. 242) "annulled and cancelled" and the bill dismissed, the certificate of the Judge (Rec., p. 251) stating the decrees were so entered for want of jurisdiction under Section 57 of the Judicial Code.

We think that on the case as made the Court had complete jurisdiction by the assertion of an existing lien on property within the jurisdiction of the Court to protect *pendente lite* that property by injunction, receiver or other remedial process, while publication was in process, by which complete jurisdiction of the *res* would have been perfected but for the decree.

We can see no material difference between the principles announced in the foregoing cases and those applicable to the case at bar, where the non-resident partners after dissolution, transfer in bulk the major portion, aggregating some \$200,000, of all the assets of the co-partnership in their possession or control within the jurisdiction, without the consent of the other partner, to a corporation of only \$10,000 capital created by them, for the express purpose of evading legal process in the district and of which they own all the capital stock, and according to the bill, without other consideration than the transfer of all said capital stock to them, and according to the Grumet opposition affidavit, in the main for the corporation's promissory notes, the nature and terms of which are undisclosed. But as stated in said affidavit (Rec., p. 155) the purpose of the creation of said corporation and of said transfers to it, was to enable said David Costaguta & Company to transact business in New York through

said corporation without such assets being subject to attachment.

The opinion of his Honor Judge Hand as to the effect of these transfers, in the two parts into which he separates his opinion, seems to us quite at variance. In the first part of his opinion (Rec., p. 227) he said:

"The firm had experienced irritating annoyances in having the status of a non-resident, and the organization of a domestic corporation was a perfectly legitimate way out. *The substance of the ownership remained quite as before*, but the assets were protected from attachments which had in the past caused waste. They were or *soon would be* the owners, and could never be called upon to turn over to DeRees any part of the assets in kind."

And he then proceeds to say that even if Costaguta & Company be solvent and the transferee corporation were entirely insolvent the transfer would still be valid (citing *Re Braue*, 248 Fed. R. 55). This part of his Honor's opinion seemed to us to be as devoid of sound equity principles as is the case cited, and he doubtless was misled by it without due personal consideration. But we agree with his Honor Judge Hand that in equity, after the transfers, the real ownership remained quite as before, except that partnership property in the possession of a liquidating partner, had been transferred to the private benefit of the transferrer, with a corporate barrier erected between the true equitable owners and the property and with the effect of evading process in general, although the intent of evading attachments only is admitted.

In the second part of his opinion (Rec., p. 228) his Honor Judge Hand said:

"If the liquidation included turning over to the plaintiff his share of the assets when converted into cash, I should agree that his lien, as it is generally called, entitled him to the protection of those assets in the hands of the liquidator and that he could by a suit under Sec. 57 of the Judicial Code, follow assets and insist upon the sequestration by a court, not of course for delivery to him, but at least to await the statement of the accounts and distribution in accordance therewith. *No partner should be compelled in the face of such an effort to trust to the continued solvency of the liquidating partner; Holmes v. Gilman, 138 N. Y. 369; the right would be clear against the grantee and the grantors might be brought in by substituted service to conclude their rights in the fund.*"

In *Holmes v. Gilman, 138 N. Y. 369*, the effort was the appropriation by one while a liquidating partner to his individual use of a portion of the co-partnership assets. In the case at bar the defendant partners in liquidation have not only appropriated the assets to their own use before a partnership settlement as was provided for in the contract, but are attempting to take advantage of their own wrong to evade the jurisdiction of the Court, and they are denying the existence of the co-partnership and claiming all the co-partnership assets as their own.

In the case of *Holmes v. Gilman, 138 N. Y. 369*, the Court held:

"A partner occupies a fiduciary position with regard to his co-partners and the funds of the firm, and may not make a personal profit out of the use of such funds.

This relationship authorizes the same remedy on behalf of a partner who has been wronged by the appropriation by a co-partner to his own use of the funds of the firm, as would exist against a trustee in behalf of a *cestui que trust*.



The wronged partner has the right, therefore, to follow the funds and, provided they can be clearly ascertained, traced and identified, and if the rights of *bona fide* purchasers for value do not intervene, to recover property into which such funds have been changed, together with the increased value thereof.

It seems that when a trustee misapplies the trust fund, using it with moneys of his own in the purchase of property, while the whole property may not be claimed by the *cestui que trust*, his right is not limited to the amount misappropriated, but he is entitled at his option, to an interest in the property, including any increased value; he and his trustee being considered co-owners in the proportion that their contributions bore to the sum total invested."

This brings us to a consideration of the three points on which it would seem the Judge in the Court below rested his judgment on the question of jurisdiction.

## VI.

**The Court below was wrong in the view that under a proper construction of the co-partnership contract, the plaintiff's lien on the assets became extinct at the date of dissolution, and his rights converted into a simple contract claim against David Costaguta & Company.**

In that part of his opinion in which he deals with the motion to dismiss service and vacate the order for substituted service his Honor Judge Hand said (Rec., p. 228) :

"That a partner has usually no rights except a bill for accounting, pending the partnership scarcely needs any show of citation. I must take it, however, upon this motion that, pending liquidation, the liquidating partner, for the purpose of defrauding plaintiff, has transferred the firm assets to another. If so, the plaintiff has lost his rights *in rem* and is relegated to an action against the firm of David Costaguta & Co. \* \* \*

However, this contract, always assuming it to create a partnership, is not of the usual kind. It permits the liquidating partner, as I have said, to take over all the assets as sole owner and to pay his share to the other partner in installments, with interest. In so providing I think that the partner's rights *in rem* were changed and that, in the absence of insolvency, the transfer could not be a fraudulent conveyance. The liquidating partner might deal as he pleased with his own so long as the transfer left him solvent.

The allegations in the bill that the purpose of the transfer was to prevent the plaintiff from recovering his share, must therefore yield, since it appears that they are necessarily without basis. Now it is quite true that under the contract as pleaded in the bill, David Costaguta & Company are not to become the sole owners of the business until the liquidation is completed, and possibly this is true under the contract itself. But I think that it makes no difference for this purpose whether they were to take over the business at dissolution or at the completion of the liquidation. In no event could the plaintiff ever receive any share in the assets as such, for in either case he is confined to his rights *in personam* against the firm upon their undertaking to pay in installments his share as eventually settled by liquidation. The only excuse for allowing him to proceed *in rem* would be his right to insist at some time upon the application of

this particular property to that payment at some future time, a right which at no time can he possess. I am of course aware that this disposition would end the case in this jurisdiction, but that is precisely the result which I think should follow, &c."

In the first part of his opinion his Honor had stated (Rec., p. 224) :

"The first question is whether during the liquidation period DeRees should have a joint possession with David Costaguta & Company. I do not think that this can be determined by considering at what time David Costaguta & Company became 'sole owners' of the 'business' though on the whole it seems most probable that that was immediately on dissolution, and not at the completion of liquidation. They might, however, become owners only at the later period and still have the right of possession meanwhile. My reason for thinking that they did have immediate possession is that both articles Eleven and Twelve show that they were eventually in any case to get the whole 'business' and that in so far as the business involved anything but 'merchandise' in the nature of things, they became owners at once. This because they were not to divide the surplus with DeRees in specie, but under both articles it was to be treated as theirs, and they became indebted to him for his final share, payable in installments with interest. That effectively precludes any division; \* \* \* Moreover I regard the phrase that DeRees should lend 'his co-operation' as putting the question beyond any doubt. It is not appropriate language to describe joint possession, but rather that DeRees, notwithstanding that the firm was charged with the duty to liquidate, was himself bound to help actively. Finally it is to be noted that for over three months DeRees allowed the firm to conduct the liqui-

dation without protest, a pretty convincing indication that he supposed it was their right."

It will be observed that his Honor based his conclusion, that the said defendant partners became sole owners of the assets upon entry on liquidation and that the plaintiff then lost his lien, very largely upon his conclusion that by the contract they were made sole liquidators; and that he based his conclusion, that they were sole liquidators and entitled to exclusive possession of the assets and the right exclusively to dispose of them, very largely upon his conclusion that they became sole owners at the time of the liquidation.

We shall consider first the question as to whether by the contract David Costaguta & Company were to be sole liquidators on the other grounds urged by his Honor, exclusive of the alleged sole ownership reason, and deal with that separately.

It will be observed that his Honor, in the first clause of his opinion, defines (Rec., p. 223) what he understands by liquidation as the word is used in Articles 11 and 12 of the contract, as follows:

"the merchandise must be 'liquidated,' i. e., sold, and David Costaguta & Co. must pay him his share when ascertained, with interest in four installments."

It is important to observe the provisions of the co-partnership contract relative to the buying and selling of the merchandise while the contract was to be in full swing and before the termination of the co-partnership on notice provided for in the subsequent clauses.

By Article 1 of the contract (Rec., p. 82) "The Hosiery Section" was established:

*"for the purchase and sale of hosiery in general and other articles of knit goods, or any other line of goods which by common accord is agreed to exploit, authorizing Mr. DeRees to manage the Section."*

**By Article 2:**

*"David Costaguta & Co. will pass on and fix the credits and conditions of sale for the clientele."*

**By Article 3:**

*"Mr. DeRees, during his stay in Buenos Aires shall submit to the approval of Messrs. David Costaguta & Co. the arrangement of purchases, whereas when he goes to North America or Europe to make purchases, he shall have complete liberty of action, within the sums which Messrs. David Costaguta & Co. shall fix in writing."*

**By Article 8:**

*"It shall be the duty of Mr. DeRees to devote all his activity to the service of the section, and he obligates himself not to participate directly or indirectly in any other commercial business, nor to be interested in any other business foreign to the section," &c.*

**By Article 10:**

*"The parties reserve the right to terminate the present agreement by giving notice of three months by registered letter."*

These provisions make it clear that during the active existence of the partnership the conduct of the "management" of the purchases and sales of the business was committed by the contract to Mr. DeRees, with limitations which required the "co-operation" of both parties to the contract in the conduct of the business.

If those were all the pertinent provisions the rights of management and control of the liquidation after the termination of the contract by the notice provided for would have been left where the law puts it in all partnership cases, that is to say, equally in all the partners, without the exclusion of any. Moreover, the quoted provisions of the contract for the contribution of the services of Mr. DeRees, exclusive of all other business, would be terminated with the termination of the contract and the duty resting upon him as a co-liquidator would be that only which the law imposes upon all co-partners, but which, within the limits of winding up the partnership affairs, and the exercise of the utmost good faith toward the other partners, may be performed by one.

30 Cyc. p. 659.

It was for the purpose of assuring the continuance of the personal services of Mr. DeRees, as far as might be necessary, that it was provided by Article 11:

"Both Messrs. David Costaguta & Co. and Mr. DeRees on receiving notice of the termination of the present contract may request the liquidation of the merchandise existing in the house, in the Custom House, in transit, or in course of manufacture pertaining to this Section. Mr. DeRees obligating himself to give his co-operation up to the moment the liquidation is terminated."

This provision of that article was made the subject of construction by the parties themselves in the letter of November 10, 1919, of Mr. DeRees to Costaguta & Company, Exhibit "K" (Rec., p. 101), and reply letter of the latter, November 11, 1919, Exhibit "L" (Rec., p. 102).

In this letter Mr. DeRees states that he is ready to assist in the liquidation, but that under the terms of the contract as he understood it, he was at liberty to engage after November 22, 1920, in other business without infraction of the contract, and in their said reply David Costaguta & Company said:

"We note that you want a liquidation and are glad to note that you are ready to assist in effecting the same \* \* \* We would like if possible *to have the liquidation made in such manner as would be entirely satisfactory to you, and accordingly would welcome any suggestions you care to make as to the manner of making the liquidation.* You have asked whether we agree with your interpretation that on and after November 22, 1919, you may if you see fit engage in any other business either for yourself or somebody else, we desire to say that our counsel in New York has advised us that in his opinion your interpretation of the contract in this respect is correct, with the qualification however which we think you will accept, namely, that on and after November 22, you are obligated to give such time as may be required at Buenos Aires as well as at New York to promptly complete the liquidation and if necessarily required to give all your time to the exclusion of all other business, &c."

Now this was a clear interpretation by the parties of the provision in Article 11 that after termination of the contract by notice, DeRees "obligated himself to give his co-operation up to the moment the liquidation be terminated" and that it was put there because it was recognized that the limitations as to DeRees engaging in other business provided in Article 8, would terminate at the time the active co-partnership should be terminated on notice, and to secure the continued personal services of Mr.

DeRees in the liquidation in co-operation with the defendants until liquidation was complete.

Considering the fact that the contract provisions covering the conduct of the business required co-operation of both parties in buying and selling, the use of the word co-operation in Section 11 as to the manner of liquidation of the merchandise, instead of indicating that Costaguta & Company were to be sole liquidators, indicated that the liquidation was to be joint, and that in such liquidation DeRees was to have at least the same powers in selling for liquidation as he had prior thereto, within the scope of the purposes of liquidation, and the powers of all the parties were to be exercised in co-operation.

The word "co-operation" means "joint action; a working together"—Standard Dictionary.

We think that his Honor's conclusion (Rec., p. 225) that lend "his co-operation" "is not appropriate language to describe joint possession" is not sound, certainly as applied to the connection in which it was used in that contract.

We think also that the right to joint possession and joint power of liquidation being one of the fundamental rights of co-partnership, the right should not be taken away by construction based upon implication of words in the contract which do not clearly indicate an intention to confer the sole power of liquidators on one or more to the exclusion of other partners.

His Honor's statement (Rec., p. 225) that "DeRees allowed the firm to conduct the liquidation without protest," meaning in the connection in which he used it, that plaintiff had allowed David Costaguta & Company exclusively to conduct the liquidation without protest for three months, is contradicted by the averments of the bill and supporting affidavits.



It appears from the bill (Rec., p. 19) that from May 1, 1919, to February 15, 1920, the defendant Ottolenghi was in New York in active management of the affairs of David Costaguta & Company in New York.

It appears from the bill (Rec., pp. 63-64, par. XXI) that after the dissolution began, the plaintiff protested to David Costaguta & Company the sales they were demanding he make at a sacrifice. That the plaintiff actually held possession of a considerable part of the merchandise in New York when he became cognizant in January, 1920, of defendants' scheme to transfer the same in fraud of his rights and now holds the same subject to the orders of the Court.

In plaintiff's supporting affidavit (Rec., p. 63) it is set forth that after the termination of the contract plaintiff objected and protested to said David Costaguta & Company against the sacrifice sales being made of the property. In the opposition affidavit of Grumet (p. 152, par. 19) it is denied that Costaguta & Company objected to plaintiff's selling the merchandise in the regular course of trade, as was averred in plaintiff's affidavit, paragraph XXI.

We are utterly unable to see where the Court below can predicate an agreement to make Costaguta & Company sole liquidators upon any alleged acquiescence for four months based upon any competent evidence in the record.

But suppose we were to concede for the sake of the argument that it was intended by the contract to make David Costaguta & Company sole liquidators of the assets of the partnership on dissolution.

"It is of course competent for the partners by agreement to commit the power of liqui-

dating the partnership business to one or some of their number."

30 Cyc. 660, and cases cited.

Such a commitment, however, does not make the firm assets the assets of the liquidating partner, nor authorize him to convert them to his own use nor to deal with them otherwise than for the purpose of liquidation and in the utmost fairness toward his co-partners, for whom he is thus made a trustee by such agreement.

In *Wade v. Rusher*, 4 Bosw. 537 (N. Y. Superior Ct. 1859), a very similar situation to the facts in the case at bar arose. There a suit was brought by one of two partners against the other, joining a third person to whom the defendant partner had fraudulently transferred partnership assets *after the plaintiff partner had released the defendant partner* from liability on the partnership transactions. The suit was for an accounting to set aside the release and to establish the plaintiff's partnership lien on the property fraudulently transferred in order to subject it to the payment of the debt found to be due from the defendant to the plaintiff. The case arose upon demurrer to the complaint and the Court held that the fraudulent transferee of the defendant partner was a proper party in order to charge the property in his hands to the payment of any balance due from the defendant to the plaintiff; that the right to an accounting and an application of the partnership property to the plaintiff's lien, which attached not only to the partnership property, but upon other property into which it may have been converted by the defendant, and not only as against him, but as against all assignees who are not *bona fide* purchasers of it for value. The Court (Bosworth, *Ch. J.*, and Hoffman and Moncrief, *JJ.*) said (p. 545):

"I apprehend, however, that there are few points in the law of partnership more fully settled than this: that, where real estate has been purchased with partnership funds, each partner has an equitable lien upon it, not only as representing creditors to secure their rights through such lien, but for payment of his own eventual demand. If the title is taken in the name of one, he is a trustee, and the copartner a *cestui que trust*. This equitable lien may always be successfully asserted against the partner, against his heirs, devisees, or his voluntary assignees, and against all except purchasers for value without notice."

In *Hooley v. Gieve*, 9 Daly (N. Y.) 104, affirmed on the opinion below in 82 N. Y. 625, a partnership was dissolved by the death of one of the partners under whose will *one* of the surviving partners *was appointed* a trustee by will of the deceased, with direction to withdraw the deceased's interest in the partnership and invest it in a particular way. Contrary thereto the trustees continued the business in a new organization for their own profit, the trust estate being used for that purpose and being commingled with the property of the new firm. The Court held:

"The entire assets of the firm, subject to the payment of its debts, become impressed with a lien in favor of the representatives of the deceased partner, to the extent of the share of the deceased partner in the firm's assets. The use of such assets in the continuation of the business by the surviving partner constitutes a breach of trust and a misappropriation of such property.

Where, as a result of such continuation of the business, the stock of the old firm has become so blended and intermingled with new stock as to lose its identity, a lien will attach to the whole in favor of the represen-

tatives of the deceased partner, and to the exclusion of the individual creditors of the surviving partner, except as against a *bona fide* purchaser or a party who has acquired a specific lien by the levy of an execution or attachment.

Upon a breach of trust and a misuse of trust funds, when the identical fund is traced, a prior equity exists in favor of the *cestui que trust* as against creditors of the wrong-doer; and in an action to enforce such equity such creditors are not necessary parties."

It would seem therefore very clear under the authorities that even the making of one or more partners sole liquidators does not divert the other partner's lien on the assets, nor does it authorize the liquidating partners to treat the assets as their own or convey the same away without consideration or for their own benefit.

We come now to the consideration of the other articles of the contract of partnership in the case at bar, which, as we have seen, his Honor Judge Hand construed to destroy, as of the date of dissolution, plaintiff's lien on the *res*.

It will be observed that the contract, after providing for request by notice of liquidation and for co-operation of DeRees in the liquidation, Article 11 then continues (Rec., p. 85):

"and Messrs. David Costaguta & Co. as sole owners of the business shall pay to Mr. DeRees the amount corresponding to him in installments which are established in the following article."

Then follows:

"12. In case this agreement is terminated and the preceding article is not applied in so far as it refers to an eventual liquidation

of the stock in hand *a balance shall be made, observing with regard to deductions the form indicated in Article 5*, and Messrs. David Costaguta & Co. shall take charge of the assets and liabilities, paying the amount which results in favor of Mr. DeRees in four equal installments, the first in cash, and the others in installments of six, twelve and eighteen months, with interest at 6%."

The words "observing with regard to deductions the form indicated in Article 5" refer to *observing* in and at the time of the making of the "balance" the form indicated by Article 5, and they precede the words "and Messrs. David Costaguta & Co. shall *take charge* of the assets and liabilities, *paying* the amount which results," &c. That which *results* from *observing* the form indicated by Article 5 necessarily must be an occurrence following the "observing" of the form indicated in Article 5. This carries the construction back to the form in Article 5, which is (Rec., p. 83) :

"a balance shall be struck and the deductions which it shall be deemed advisable to make in the *merchandise as well as in the credits*, shall be determined by mutual accord between Messrs. David Costaguta & Co. and Mr. DeRees."

We apprehend that the use of the word "form" in Article 12 is equivalent to manner of making as indicated in Article 5. Although the time for making the balance in Article 5 was annually, and therefore not applicable to the time of making the final settlement balance in Article 12, the manner or form of ascertaining it, by making the deductions in the merchandise and credits "by common accord," were to be observed in reaching the balance provided to be reached in Article 12 before "David Costaguta & Co. shall *take charge* of the assets and liabilities, *paying* the amount which results in favor

of Mr. DeRees in four equal installments, the first in cash, and the others in installments of six, twelve and eighteen months with interest at 6%." Moreover, the use of the word "paying" in the present participle form indicates that the paying is contemporaneous with the taking charge.

His Honor Judge Hand, every time he refers to the payment of these installments (Rec., p. 224), overlooks the very material fact that only the last three installments were to be deferred and bear interest, but that the first was to be in *cash*. The word as there used is used as in antithesis to "credit," that is to say, to be a present payment at the time indicated and "not on credit."

Catlin v. Smith, 24 Vt. 85, 86.

The time indicated was when the balance was ascertained in the manner provided by Article 5 after the deductions on merchandise and credits were made by common accord when there had not been a complete liquidation of the assets with DeRees' co-operation under Article 11. The payment of this one-fourth cash installment could only be made after the balance was ascertained, either on complete liquidation under Article 11 of all the assets, or upon ascertainment of the balance by deductions in merchandise or credits by mutual accord under Article 12, and it is only by simultaneously "paying" this cash installment that Costaguta & Company became entitled "to take charge of the assets and liabilities." It is a condition precedent.

This being the only reasonable construction of Article 12, it absolutely fixes the time when Costaguta & Company were to become the "sole owners" under the provisions of Article 11 by taking charge on the establishment of the balance by mutual accord and at least paying the cash balance

and obligating themselves by the mutual accord to pay the deferred installments.

His Honor Judge Hand overlooks the very material point that the mere sale of the merchandise would not render the account as between the partners a liquidated account within the meaning of Article 12, but the credits outstanding were also provided to be liquidated or adjusted between the parties by common accord before any balance could be struck and the right of the plaintiff fixed. It was only when this liquidation of assets was completed with the co-operation of DeRees or adjustment of values made, by common accord, and a fourth of the balance so ascertained paid to the plaintiff, that the partnership lien of the plaintiff was to be released as to the residue and so converted into only a personal claim.

In Article 13 the contract provides that in the case of the death of Mr. DeRees, Costaguta & Company will liquidate the stock on hand within the period of one year from the date of the death, that they will make a balance, pay the heirs of Mr. DeRees the amount which belongs to him in the installments which are indicated in the preceding article, and that interest at the rate of 6 per cent. annually will also be paid to the heirs.

This article provides for a case in which the law itself would cast the liquidation upon the surviving partners, and they were in that case to make the balance. No co-operation in liquidation could be made and therefore it was not provided for. But if a case had arisen under that clause the representatives of the deceased partner could have asserted his lien.

Hooley v. Gieve, 9 Daly 104.

Considered from every standpoint we do not see that there is anything in Articles 11, 12 or 13 of the



contract which can operate to waive or destroy the partner's lien of the plaintiff.

From the averments of the bill it appears that the alien co-partners have without the consent of the plaintiff transferred to this corporation created by them, and for their sole undivided benefit, the major part of the assets in the district, and that they are claiming individual ownership in all the co-partnership assets and they are claiming that no co-partnership exists now or ever existed, and they claim title to all the assets adversely to the co-partnership and asserting complete ownership if the answer to the bill filed by Grumet is to be considered at all on this proceeding.

There are, however, other assets in the district which were not actually transferred to the defendant corporation, to wit, those held by plaintiff subject to the orders of the Court, and the commingled funds held by the alien defendant Taffell, over all of which the Court has jurisdiction of the *res*.

## VII.

The Court below erred in holding that under the provisions of the co-partnership contract, plaintiffs had no lien upon the funds of the hosiery section deposited in and commingled with the funds of David Costaguta in banks in New York and New Jersey and traced from those banks into the hides in the district, of the estimated value of from \$100,000 to \$150,000, and that therefore the Court had no jurisdiction as to said *res*.

In the opinion of the Court below (Rec., p. 226) it is stated:



"Article Seven (of the contract) clearly shows that the cash was to be kept not by the supposititious firm, but by David Costaguta & Company alone."

An examination of Article 7 (Rec., p. 84) shows that its entire provisions relate wholly to the share of Mr. DeRees in the profits ascertained on the annual accounting provided for each 31st of October by Article 5, and provide that Mr. DeRees could withdraw 50 per cent. of the same, and he was obligated to leave "the balance thereof on deposit with Messrs. David Costaguta & Company drawing an annual interest of 6 per cent."

We have already discussed the purpose of that provision. There is nothing in the contract providing that the funds of the co-partnership should be deposited with David Costaguta & Company.

But in the opinion it is further stated (p. 226):

"The opposing affidavits assert that the practice of commingling funds had been uniformly followed from the outset."

This was giving weight to the *ex parte* affidavit of Grumet used as an answer to the bill on the merits, to determine the jurisdiction of this Court over the *res*, and in advance of the time when the value of the witnesses' testimony could be sifted by cross-examination. That Grumet could not possibly know anything about the matter except by hearsay, he having been in Europe from before the time of the contract to the fall of 1919, appears from the affidavit of DeRees (Rec., pp. 189-190). We do not think that any weight whatever should have been given to opposing affidavits going to the merits in this proceeding on a question of jurisdiction.

It further appears from plaintiff's supporting affidavit (Rec., p. 199) that soon after plaintiff

came to New York the moneys of the co-partnership were at first kept in his own account, a deposit with Lunham & Moore, in New York, subject to his own check. Also credits were opened in New York by David Costaguta & Company with the American Express Company at New York, subject to be disbursed by plaintiff on orders. Also (Rec., p. 200) plaintiff opened a bank account in which such co-partnership funds were kept in his individual name. Also David Costaguta & Company opened a bank account in the National City Bank in New York City, subject to disbursement by plaintiff in his individual name. That in May, 1918, other bank accounts were opened in New York City in the name of David Costaguta & Company into which the funds collected for merchandise sold in the United States and elsewhere by the plaintiff were deposited.

It is utterly immaterial if in fact the co-partnership funds in Buenos Aires were deposited with some bank there or with David Costaguta & Company, and if they received such deposits, and mixed the fund with other funds, still they were bound under the contract to keep correct books and to account for the moneys of the co-partnership and the mingling of money by a bank or by a co-partner with other moneys of its or his own does not destroy the equitable lien of the true owners of the account over the deposit.

In *Central National Bank v. Connecticut Mutual Life Ins. Co.*, 104 U. S. 54, which is a leading case on the following of trust funds in a bank account, this Court quotes with approval from Lord Ellenborough, on the right, as follows:

"Which is the case when the subject is turned into money and confounded in a general mass of the same description, for equity will follow the money, even if put into a

bag or an undistinguishable mass, by taking out the same quantity. And the doctrine that money has no earmark must be taken as subject to the application of this rule."

The very point now made by the Court below to defeat its jurisdiction was answered by this Court in that case as follows:

"But although the relation between the Bank and its depositor is that merely of debtor and creditor, and the balance due on the account is only a debt, yet the question is always open, to whom in equity does it beneficially belong? If the money deposited belonged to a third person, and was held by the depositor in a fiduciary capacity, its character is not changed by being placed to his credit in his bank account.

'It is,' said Lord Justice Turner, in the case of *Pennell v. Deffel*, 4 DeG. M. & G. 372, 388, 'I apprehend, an undoubted principle of this court that as between *cestui que trust* and trustee and all parties claiming under the trustee, otherwise than by purchase for valuable consideration without notice, all property belonging to a trust, however much it may be changed or altered in its nature or character, and all the fruit of such property, whether in its original or in its altered state, continues to be subject to or affected by the trust.'"

It is averred in the bill (Rec., p. 23) that these hides located in the district of the value of about \$150,000 were acquired by said David Costaguta & Company with the commingled funds of the co-partnership, it having been previously averred (Rec., p. 19) that the funds of the co-partnership had been commingled with the funds of David Costaguta & Company by deposit in certain named banks in New York City and New Jersey. In the supporting affidavit of Miss Saft, the bookkeeper (Rec.,

p. 177), the details of the tracing is fully set out, showing the collection of accounts due the hosiery section aggregating \$44,404.16, the deposit of the same in the said bank accounts in New York City and New Jersey, the checking out of said bank accounts by David Costaguta & Company of said moneys and its application by them to the release of attachments on said hides.

It is true that said Grumet attempts in his affidavit to deny this tracing, saying that the money used was the money of said David Costaguta & Company, but he at the same time denies that the said co-partnership ever existed or had any funds. We think that denials of the tracing of the funds belongs to the hearing in chief, when the witnesses can be heard on examination and cross-examination.

The particular banks through which the funds are traced do not have to be in the jurisdiction of the Court, it is sufficient that the property into which it is traced is within the jurisdiction of the Court, to give the Court jurisdiction of the *res*.

Where trust money is used to remove an incumbrance, the lien of the trust attaches to the property.

39 Cyc. 538 and cases cited.

The right to follow a trust fund through a bank account does not depend upon whether the deposit was made lawfully or unlawfully.

39 Cyc. 529 and cases cited.

We insist the Court erred in holding that the plaintiff's partnership lien was lost and, therefore, the jurisdiction did not exist, because the funds were commingled with the funds of David Costaguta & Company in accounts kept in their name in banks.

## VIII.

**All the requisite elements exist in this cause to give the Court jurisdiction of the subject-matter under Section 57 of the Judicial Code.**

In *Goodman v. Niblack*, 102 U. S. 556, Mr. Justice Miller, for the Court, said:

"The purpose of the present bill is to follow this money in Niblack's hands, as a trust fund devoted by Sloo in his lifetime to the payment of the plaintiff's judgment. This trust arises, if it exist at all, out of a deed of assignment made by Sloo of all his property, rights and credits to Benjamin H. Cheever and James Wiles, of the date of February 3, 1860, for the benefit of all his creditors, but with some preferences, among which is the judgment of complainant."

Then after holding that certain non-resident persons were necessary and indispensable parties, he said:

"This, however, need not defeat the jurisdiction of the court if the bill is amended by making them defendants.

This is a proceeding in equity to enforce a lien on the fund which is within reach of the court, and as the trustees and complainant have the requisite citizenship, section 738 of the Revised Statutes provides a remedy for inability to serve process by an order of publication. If they appear, the suit will proceed as usual. If they do not appear, the decree, so far as it affects the fund in the hands of Niblack, will bind them; and this is all that is necessary to give the court jurisdiction to grant the relief prayed by defendant."

*Greeley v. Lowe*, 155 U. S. 58-74.

*Dick v. Foraker*, 155 U. S. 404.

In *Louisville v. Nashville & Western Union*, 234 U. S. 369, this Court said (p. 376):

"We conclude that the provision in Sec. 57 of the Judicial Code, respecting suits to remove clouds from title, was intended to embrace, and does embrace, suits of that nature when founded upon the remedial statutes of the several States, as well as when resting upon established usages and practice in equity."

The case of *Chesley v. Morton*, 9 App. Div. (N. Y.) 461, is an exact parallel to the case at bar; it was a suit by the administrator of a deceased partner against a non-resident partner alleging partnership assets in the district, setting up the partnership lien, praying the appointment of a receiver to conserve the assets in the district, and to enforce the rights of the plaintiff, and it went further and demanded an accounting, and for a personal judgment, and its enforcement on the partnership property in the jurisdiction, service on the non-resident by publication under Section 439, Code of Civil Procedure of New York, being invoked "where the complaint demands judgment \* \* \* that an interest or lien in favor of either party be enforced, regulated, defined or limited, or otherwise affecting the title to such property." The Court said (p. 463):

"The complaint, when scrutinized, will be seen to have two aspects. It seeks to obtain a judgment against the defendant for the amount claimed to be due by him to the firm of Morton & Chesley. In this aspect it is purely personal in its nature. But the demand for a receiver of the partnership effects, with power to sell, shows that more is sought than a merely personal judgment. There can be no doubt that a member of a dissolved partnership has a lien upon its assets.

He is not compelled to rely upon the solvency of his co-partner, but is entitled to the specific application of the joint assets to the payment of the sum due him upon the dissolution (*Lindley on Partnership*, [6th Eng. ed.], 358, 542; *Story on Partnership*, Secs. 97, 347; *Taylor v. Neate*, 39 Ch. Div. 538). The demand of the receivership and injunction is here made in order to effectuate this lien, and the relief prayed for is justified by the allegations of the complaint.

Regarding the plaintiff's suit in this aspect, that is, as one brought to enforce a lien upon the partnership assets in this State, it comes precisely within the provisions of subdivision 5 of section 438 of the Code, and there can be no doubt that it is an action of the class which may be begun through service by publication. Specific property within the limits and jurisdiction of this State is sought to be subjected to a lien in favor of the plaintiff—one of the actions particularly mentioned in *Pennoyer v. Neff* (*supra*).

But one further question remains to be considered. The plaintiff demands a greater measure of relief than could be given him in an action begun without personal service of the summons. Is it essential to the granting of the order that the action, in all its aspects, be maintained here? We think not. Section 439 of the Code requires the complaint to show 'a sufficient cause of action against the defendant to be served.' This the present complaint does. It demands a measure of relief which the court is competent to grant, together with more which it is not. It frequently happens, however, especially in equity suits, that more is asked than the facts proved permit the court to grant. This, however, is no obstacle to the rendering of the decree to which the plaintiff is entitled. The plaintiff, if he proves his case, is entitled, *secundum allegata et probata*, to the application of the New York



assets to the payment of his claim, and this right is 'a sufficient cause of action against the defendant' within the meaning of section 439. *Porter Land & Water Company v. Baskin* (43 Fed. Rep. 323), decided under the California Civil Code, is an authority on this point. The defendant denies that there are New York assets, but this is not the time to try that issue. It is the complaint (Sec. 439) which must determine whether a sufficient cause of action exists. If the plaintiff has stated in his complaint what he will be unable to prove at the trial, he will pay the usual penalty."

### Cases Distinguished.

YORK CO. SAVINGS BANK V. ABBOTT, 139 F. 988.

The question in that case was whether, under the terms of a lease and certain options therein, the lessee acquired any lien or interest in the property at the termination of the term such as would give jurisdiction to the then United States Circuit Court to bring in the non-resident lessor by publication under Section 8 of the Act of 1875.

The lease of a store lot executed in 1867 is set out in the opinion. It was for a term of twenty-five years at an annual rental of \$450 and payment of taxes, the lessee to erect and maintain a store thereon during the term. Then follow certain options arising at the end of the term which are given to the lessor alone.

(1) The *lessor* "shall have the privilege of extending the lease by a perpetual lease forever to the lessee or his assigns at the above described rent and taxes."

(2) Or "if the *lessor* or his assigns or representatives prefer, they may have an appraisal of the lot and building thereon, with the option on their part of purchasing such buildings at such appraised value or of selling to the lessee or his repre-



sentative the lot at such appraised value, whichever the lessor, his assigns or representatives may elect."

(3) "And the lessee doth hereby covenant for himself, his heirs and representatives, to purchase said lot at such appraisal, or to convey said building to the lessor or his representatives according to the *decision and election* of said lessor or his representatives, or to execute and complete a perpetual lease of said lot, as before stipulated, at the end of said term, *if* the lessor or his representatives shall demand such lease."

An examination of the above terms show conclusively that all the options which were contracted for were reserved exclusively by the lessor if he elected to exercise any. The lease was for a definite term. The lessee had no right to demand a longer term, but the lessor was given the right *if* he demanded it. The option to purchase the building at the end of the term was reserved to the lessor, but the obligation to so purchase was not imposed on him. The option to sell the lot at an appraised value was reserved to the lessor, and the obligation to purchase was put on the lessee only *if* the lessor exercised the option to sell. As plainly stated in the lease, these options were given to the lessor as a privilege which was reserved to him and his representatives or assigns at the end of the term, but none of which he was under any obligation to exercise.

The bill was brought by the lessee, after the term, alleging in substance that the lessor or his assignee, Mrs. Abbot, the non-resident, had not exercised any of these options, and refused to exercise them, and prayed the Court to appoint a master to exercise that option for her, make conveyances, &c. The Court ruled that the plaintiff set up no right, interest or lien in the property within the meaning of

Section 8 of the Act of 1875. Putnam, J., said (p. 993):

"While in some of the cases determined by that Court (U. S. Supreme Court) the rights of an absent defendant who has not appeared have been effectually disposed of, in none of them has any *mere personal* act on the part of the absent defendant been a necessary element."

And the Court dismissed the case for want of jurisdiction.

In that case there was no challenge of the right of plaintiff to remove, at the end of the term, the store erected on the land, nor was there any allegation that the lessor had exercised any of the options reserved to the lessor, whereby, if exercised, a correlative right would then and not till then spring up in the lessee, but the equity set up was to make the lessor exercise a personal privilege reserved to her by the contract or have the Court do it for her, whereby, if exercised, a right of purchase or to a perpetual lease might then come into existence. It was, of course, the duty of the Court to see that the bill on its face set up an existing title or lien on property in the district, and as the averments of the bill did not do that, no other decision could be reached. The bill set up no cause of action on its face, and, much less, the existence of any title or lien upon property, and was a bare assertion of a claim without legal attributes. The case at bar possesses no such infirmities.

JONES V. GOULD ET AL., 149 F. 153, C. C. A., 6TH  
CIRCUIT.

There the syndicate contract was construed by the Court to be one of partnership with specified powers vested in managers to build and to buy railroads,

stock in railroads, purchase coal, lands, etc. The bill charged mismanagement by the managers and breaches of trust by wrongful acts which resulted in serious loss and damages to other subscribers and to the plaintiff. The prayers were for injunction to restrain the managers from doing certain specified things in the management of the syndicate, for a receiver and for sale of the assets, the payment of its debts and the distribution of the net proceeds to the subscribers.

The only averment in the bill which attempted to localize the action in the Southern District of Ohio was an averment that the syndicate owned stock in two Ohio corporations, which were made parties defendant, but no relief was prayed against them, and the other defendants, citizens of other states, were sought to be brought in by publication.

The Court, holding that the case was not within the Federal Statute for substituted service, distinguished the case from the *Jellenik* case (177 U. S. 1) and said:

“For here there was no controversy about the ownership of the stock, as in that case, or without any lien or claim to it, or about any cloud or incumbrance upon it. The controversy raised by the bill is over the management of the business and affairs of the railroad companies by the managers, such as their expenditure of large sums of money in grading parts of the road, and not completing them, ‘whereby the grading is going to ruin,’ the failure to effect proper and advantageous connection with other railroads, and the like. Upon the allegations of such mismanagement it is charged that there is such a breach of the syndicate agreement and of the duties of the managers as justifies the dissolution of the compact and a closing up of the enterprises which the subscribers undertook. We are therefore of opinion that

the case was not one in which the court could acquire jurisdiction of the defendants by the extraordinary service of process prescribed by the statute referred to."

The case is distinguished by the fact that it was a suit to declare a breach of contract by managers as justification for its termination and for winding up a syndicate agreement and distribution of assets before the time fixed by contract for dissolution, and no assertion of any individual property right in the stocks in question was made other than might rise *upon a decree* of dissolution of the syndicate or partnership. It was not a suit to enforce an existing choate lien, but to enforce a lien to be created by the suit. This is the interpretation put upon that decision in *Wabash v. Westside R. R.*, 235 Fed. 648. No wrongful act is charged relative to the transfer of the stocks in question or relief to reclaim it. The jurisdiction was sought to be predicated solely upon the fact that the syndicate possessed stock in corporations in the district.

It was not a case like the one at bar, where the partnership is already in process of liquidation, where a large part of the assets are alleged to have been transferred illegally to a corporation in this district, without consideration, except that all of its stock was transferred to and is being held by one partner in his own name and in his own right, and where the relief sought is to subject that stock and other assets of the partnership in the jurisdiction, specifically pointed out in the bill, to the plaintiff partner's lien and for partition of the partnership assets in this jurisdiction.

## IX.

**The District Court had no jurisdiction, on constitutional grounds, on the motion for interlocutory relief or motion to vacate service or order for service by publication, to dismiss the plaintiff's bill for alleged want of jurisdiction.**

The constitutional principle invoked against the exercise by the Court of the power to dismiss the bill, in part on *ex parte* affidavits in opposition to the jurisdictional averments of the bill, in the manner and form in which it was done, raised and raises a constitutional question not merely incidentally collateral to the general jurisdiction of the Court derived from the Constitution, but which goes to the power of the Court to deprive the plaintiff without due process of law of his right of property in the suit, by a procedure which deprived him of such right. The constitutional question goes to the marrow of the jurisdictional question, and we think that the Court has plenary jurisdiction over the whole case under Section 238 of the Judicial Code. We know of no decision of this Court which expressly covers this matter, unless it may be inferred either positively or negatively by the case of *Filhoil v. Torney*, 194 U. S. 357.

A constitutional question may become "involved" or "drawn in question" by the decision or action of the Court as well as by the acts of the parties (*Chappell v. U. S.*, 160 U. S., 499, 507, 509), and if it exists it is immaterial whether there is or not a certificate as to the jurisdiction, so far as investing this Court with plenary power to review the entire case. The constitutional question being paramount, the limitation on review is not opera-

tive, certainly not where the one involves the other. The limitation is operative only where there is a jurisdictional question and questions other than constitutional ones involved.

We are cognizant of the existence in Section 37 of the Judicial Code of the provision:

"If in any suit commenced in a district court, \* \* \* it shall appear to the satisfaction of the said district court, at any time after such suit has been brought \* \* \* that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said district court \* \* \* the said district court shall proceed no further therein, but shall dismiss the suit, &c."

But that provision is substantially the same as far as applicable as that in the Act of 1875, 18 Statute at Large, Chapter 137, Section 5.

In *Hartog v. Memory*, 116 U. S. 588, the bill had pleaded a proper diversity of citizenship to make a case of a suit between an alien and a citizen of Illinois, to give the Court jurisdiction, and there was no plea by the defendant to the jurisdiction.

In taking evidence on the merits the defendant offered himself as a witness, and incidentally replied to a question of counsel that he was a citizen of Great Britain, which if true would make a case of a suit between aliens of which the Court would not have jurisdiction. A verdict was rendered for plaintiff, whereupon the defendant moved to dismiss the suit for want of jurisdiction, which motion the Court granted without any other proceedings or evidence, basing it upon Section 5 of the Act of 1875. On appeal this Court reversed the lower Court. This Court said (p. 590):

"Neither party has the right, however, without pleading at the proper time and in the proper way, to introduce evidence the only purpose of which is to make out a case for dismissal."

"The case is not to be tried by the parties as if there was a plea to the jurisdiction, when no such plea has been filed. The evidence must be directed to the issues, and it is only when facts material to the issues show there is no jurisdiction that the Court can dismiss the case upon the motion of either party."

And (p. 591):

"Beyond this, no doubt, if, from any source, the Court is led to suspect that its jurisdiction has been imposed upon by the collusion of the parties or in any other way, it may at once of its own motion cause the necessary inquiry to be made, either by having the proper issue joined and tried, or by some other appropriate form of proceeding, and act as justice may require for its own protection against fraud or imposition.

But the evidence on which the Circuit Court acts in dismissing the suit must be pertinent either to the issue made by the parties, or to the inquiry instituted by the Court."

In the case at bar there was no plea to the jurisdiction, but the motions pending were the motion of plaintiff for interlocutory relief and the motions of defendants to vacate entries of service and to vacate an order for service by publication on alien defendants, because it was alleged that the suit was not an action to enforce any legal or equitable lien, etc., on property within the district (Rec., pp. 128 and 122). If there had been a plea to the jurisdiction, on the trial of the issues of

fact, the plaintiff would have had the constitutional right to examine and cross-examine the witnesses.

Turpin v. Lemon, 187 U. S. 51-58.

Hurtado v. California, 110 U. S. 16-539.

We frankly admit that if the want of jurisdiction over the subject-matter and *res* was in the opinion of the Court apparent upon the face of the bill, without considering evidence *de hors* the bill, it would have been within the jurisdiction of the Court to make an order on this hearing as on demurrer dismissing the bill.

We go further and admit that the literal translation of the contract of partnership annexed to the moving affidavit of plaintiff, and the agreed translation, could properly be considered by the Court as a part of the case made by the bill on the question of jurisdiction. But we insist that the Court could not decide the jurisdictional question and dismiss the bill by basing its decision in part on the contract and in part on alleged construction of clauses of the contract by acts of the parties based upon the fact (Rec., p. 226) that "the opposing affidavits assert that the practice of commingling funds had been uniformly followed from the outset," etc., and concluding that by the contract so interpreted the lien did not exist, and also (Rec., p. 225) that an estoppel existed against the plaintiff by alleged acquiescence for three months in their being the sole liquidating partners, all based upon *ex parte* affidavits received without an opportunity to plaintiff of cross-examining these witnesses.

It is true that these statements appear in that part of the opinion which deals with the issues made by the alleged special appearances in opposition to the plaintiff's motion for appointment of a receiver,



injunction, etc. It is also true that his Honor introduces that portion of his opinion in which he deals with the "motion to dismiss the service and vacate the order for substituted service" (Rec., p. 227) with the statement, "This question must be decided upon the bill alone." But he did not hold to that limitation. For the purpose of determining the question he assumes that his previous finding, based upon the *ex parte* opposition affidavits, to the effect that Costaguta & Company were sole liquidators, was an established fact, and used the assumption as an element in determining his construction of the other articles of the contract. He says (p. 228) :

"However, this contract, always assuming it to create a partnership, is not of the usual kind. It permits *the liquidating partner*, as I have said, to take over all the assets as sole owner," etc.

And (p. 229) :

"The liquidating partner might deal as he pleased with his own so long as the transfer left him solvent."

Moreover, he bases the alleged want of jurisdiction over the commingled funds in Taffell's hands, and that diverted into the hides, upon the alleged practice set up in the *ex parte* opposition affidavits of commingling funds.

We concede that the Court would have had jurisdiction to deny interlocutory relief on such *ex parte* affidavits, without dismissing the bill, but in such case the plaintiff would have had the right of review in the Circuit Court of Appeals on the interlocutory order. The Court, while denying interlocutory relief, could also have made a suitable order providing that an issue be made on the ques-

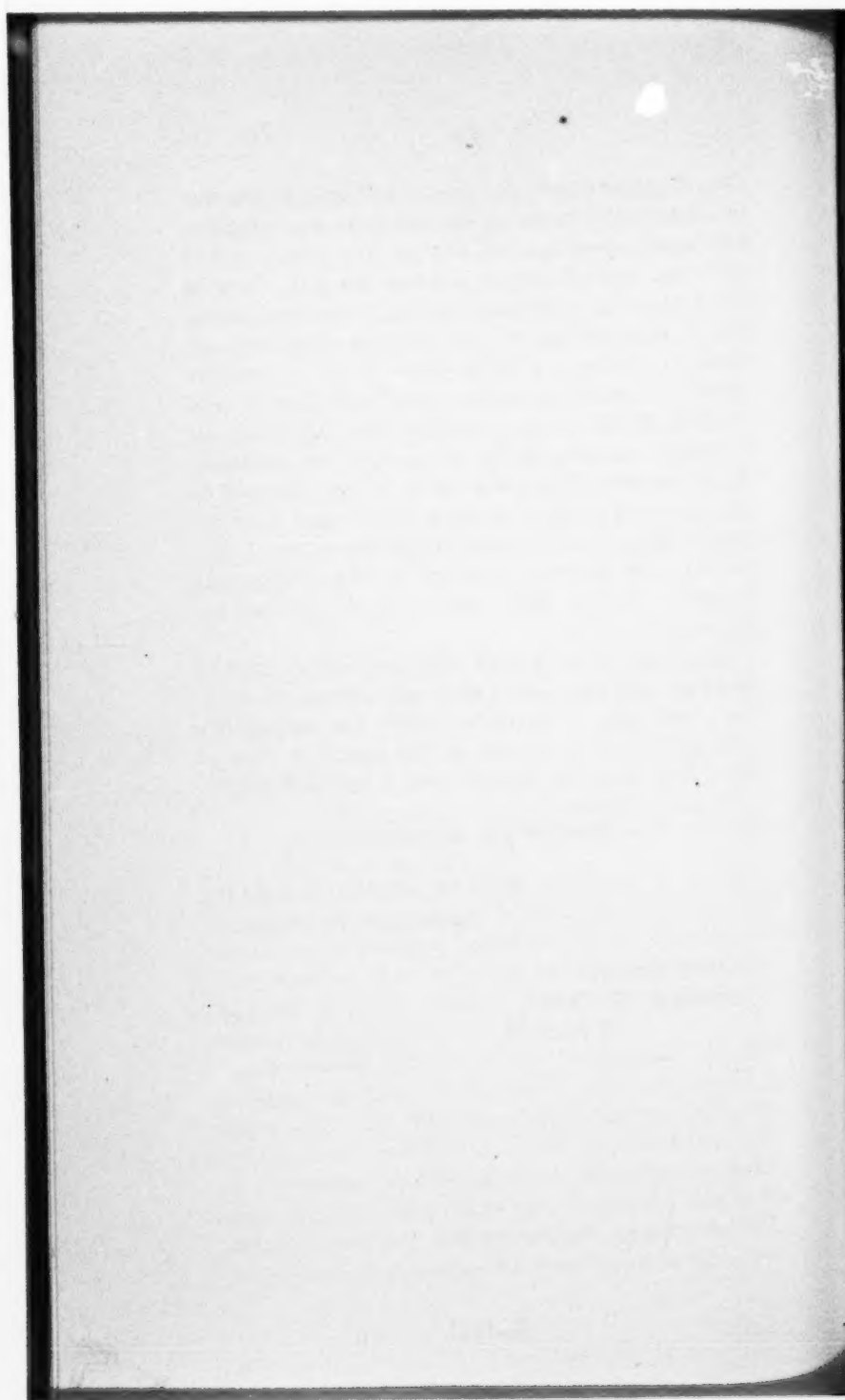
tion of jurisdiction of the *res*, and that testimony be taken under examination and cross-examination, and upon consideration thereof the Court would have had jurisdiction to dismiss the bill. But in the manner in which it proceeded it deprived plaintiff of due process of law and his constitutional right to invoke the jurisdiction of the Court for protection of his property right, and thus it was without jurisdiction to dismiss the bill upon the *ex parte* evidence it did so receive and consider. All these objections were made by the plaintiff to the proposed form of decrees before they were entered (Rec., p. 230), and the action of the Court therein was assigned as error in our assignments of error (Rec., p. 253), filed with the petition for appeal.

Wherefore it is prayed that the said decrees be reversed and that this Court will give such directions as will, if possible, right the appellant's wrongs, which, by reason of the mistaken view of the Court as to its jurisdiction, it has suffered.

Respectfully submitted,

ERWIN, FRIED & OZAKI,  
Appellant's Solicitors.

MARION ERWIN,  
FREDERICK M. OZAKI,  
Of Counsel.



OCT 6 1920

JAMES D. MAHER,  
CLERK.

# Supreme Court of the United States

OCTOBER TERM, 1920.

No. 331. **341**

HENRY S. DE REES,  
Plaintiff-Appellant,  
against

DAVID COSTAGUTA, MARCOS A. ALGIERS,  
ALEJANDRO SASSOLI, EUGENIO OTTO-  
LENGHI, individually and as co-partners in  
business composing the co-partnership of  
David Costaguta & Company, RENADO  
TAFPELL and the AMERICAN-EURO-  
PEAN TRADING CORPORATION,  
Defendants-Appellees.

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## BRIEF OF SOLICITORS FOR DEFENDANTS-APPELLEES.

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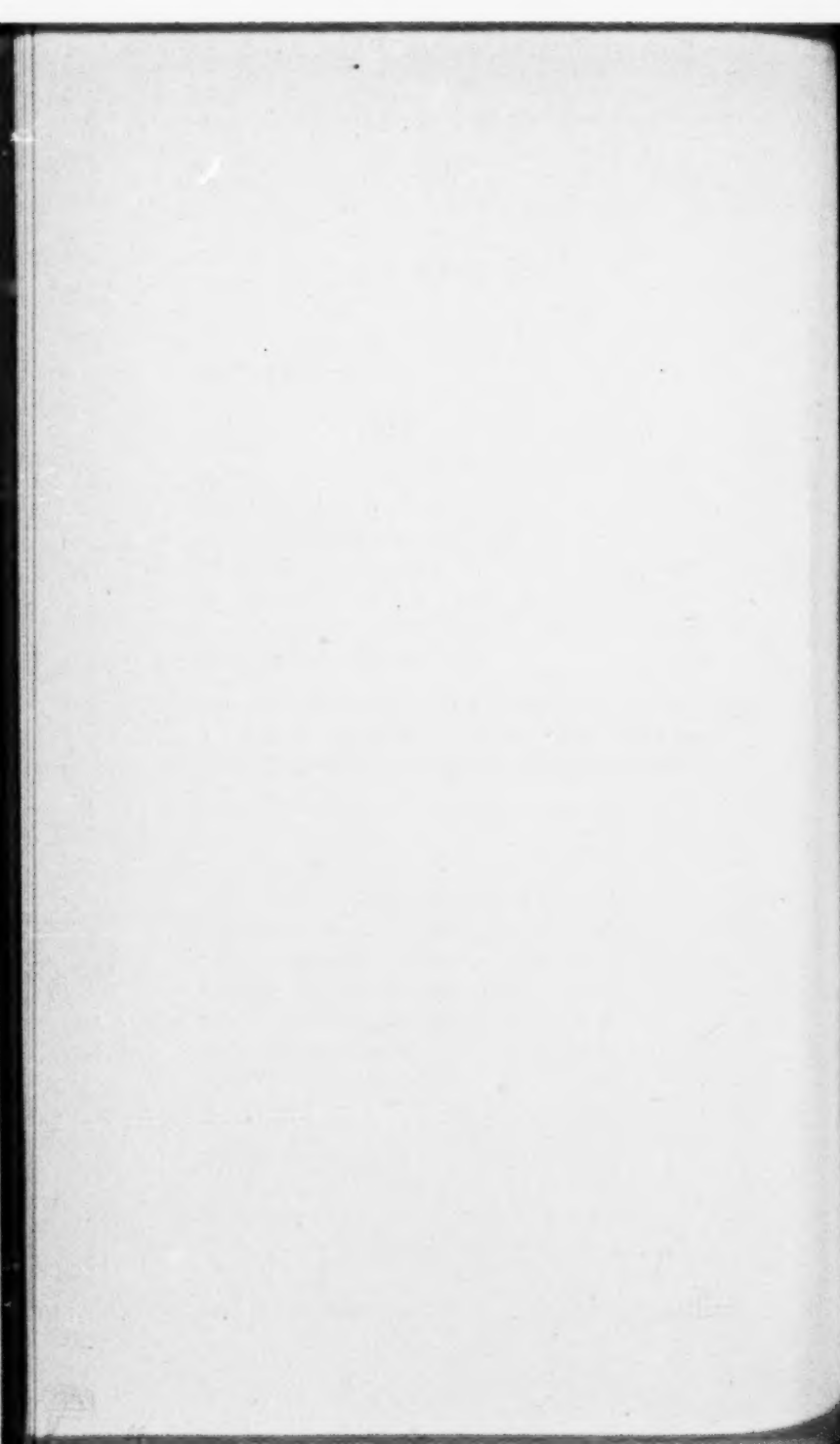
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WALTER H. MERRITT,  
Solicitor for non-resident defendants  
David Costaguta, Marcos A. Algiers,  
Alejandro Sassoli, Eugenio Otto-  
lenghi, individually and as co-part-  
ners in the business of David Costa-  
guta & Company, appearing speci-  
ally herein.

A. DELAFIELD SMITH,  
Solicitor for resident defendants,  
Renado Taffell, and the American-  
European Trading Corporation, ap-  
pearing specially herein.

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# Supreme Court of the United States

OCTOBER TERM, 1920.

No. 931.

---

HENRY S. DE REES,  
Plaintiff-Appellant,

against

DAVID COSTAGUTA, MARCOS A.  
ALGIERS, ALEJANDRO SASSOLI,  
EUGENIO OTTOLENGHI, individu-  
ally and as co-partners in busi-  
ness composing the co-partner-  
ship of David Costaguta &  
Company, RENADO TAFFELL  
and the AMERICAN-EUROPEAN  
TRADING CORPORATION,  
Defendants-Appellees.

---

## **BRIEF OF SOLICITORS FOR DEFENDANTS-APPELLEES.**

As is stated on page 1 of his brief, the plaintiff-appellant seeks to maintain this appeal directly to this court under Section 238 of the Judicial Code from decrees of the United States District Court for the Southern District of New York (Rec., pages 241, 244), dismissing the complaint as against the several defendants. The certificate of the Honor-



able Learned Hand, District Judge (Rec., page 251) attached to the order, allowing appeal (Rec., page 247) is as follows:

"The plaintiff having entered his appeal to the Supreme Court from the decrees of this court entered the 10th day of April, 1920, vacating the order for service by publication on the non-resident defendants, and the service of subpoena on all the defendants, and dismissing plaintiff's bill as more particularly set forth in said decrees,

I HEREBY CERTIFY that said decrees were entered solely because the case as made by the bill did not set forth a legal or equitable claim to or lien on the property in the district, of which this Court would have jurisdiction within the meaning of Section 57 of the Judicial Code, or in which this court could render a judgment otherwise than a judgment *in personam* against the non-resident aliens who appeared specially and objected to the jurisdiction of the Court."

If this court has jurisdiction of the appeal the question of the jurisdiction of the court below, alone, will be reviewed (Judicial Code, Section 238), although the plaintiff-appellant, in Point IX of his brief (Plaintiff-Appellant's Brief, page 84) seeks to raise a Constitutional question involving the "Jurisdiction" of the District Court, "on constitutional grounds \* \* \* to dismiss the plaintiff's bill."

### Statement.

The plaintiff-appellant has reviewed the case at such length that the defendants-appellees need only briefly outline the proceeding.

On March 10, 1920, the plaintiff-appellant, alleging himself to be a resident of the State of New Jersey, filed in the United States District Court for the Southern District of New York a bill of complaint against David Costaguta, Marcos A. Algiers, Alejandro Sassoli and Eugenio Ottolenghi, composing the firm of David Costaguta & Company, alleging them to be aliens and residents of the Republic of Argentine, South America, joining with them as parties defendants the American-European Trading Corporation and Renado Taffell, residents of the Southern District of New York. The bill of complaint alleges that the plaintiff entered into a certain contract in writing with the said firm of David Costaguta & Company, which contract the plaintiff contends constituted a partnership between himself on the one hand and the said firm of David Costaguta & Company on the other hand. The pleader sets forth in the bill of complaint what he deems to be the "substance and effect" of the contract. (See paragraph Eleventh of the Bill of Complaint; Record, pages 5-11). The plaintiff-appellant concedes (plaintiff-appellant's brief, pages 10, 87) that he "is bound by the terms of the contract" as set out in the translation of the same (Record, page 82). The plaintiff further alleges that because of certain differences arising between the parties he elected to terminate the said contract as of November 22, 1919; that he demanded a liquidation of the merchandise on hand, an accounting and detail statement of the transactions

of the business of the alleged co-partnership and payment of certain moneys claimed to be due him (Record, fols. 49-52), with which demand he alleges the firm of David Costaguta & Company failed to comply; that on or about the 31st day of January, 1920, the firm of David Costaguta & Company caused the American-European Trading Corporation (one of the other defendants in this action) to be organized under the laws of the State of New York (Rec., page 21, fol. 62); and that said firm caused certain assets of the alleged co-partnership to be transferred to such corporation, in fraud of the plaintiff-appellant, the major part of which consisted of certain hides, of the alleged value of one hundred and fifty thousand dollars, claimed to have been bought by the firm of David Costaguta & Company with the commingled funds of the alleged co-partnership, which assets were within the territorial jurisdiction of the Southern District of New York (Rec., pages 22, 23). The plaintiff prays for the following relief (Rec., pages 26 to 30):

**FIRST.**—That the alleged co-partnership arising out of said contract “be declared dissolved, and that all of the property, assets and effects thereof wheresoever situate, lying and being, be liquidated, sold and disposed of and converted into cash,” etc. (Rec., fol. 76).

**SECOND.**—That the non-resident defendants, comprising the firm of David Costaguta & Company “account to the plaintiff for all their acts, conduct and transactions in and about the business of said co-partnership, to the end that it be established, what, if any, sum or sums there be and remain due and unpaid to the plaintiff from said David Costaguta & Company, in and about the business and

transaction" of the alleged co-partnership, etc. (Rec., fol. 77).

THIRD.—"That the plaintiff be decreed to have a lien upon all of the property, assets and effects of the defendants David Costaguta, Marcos Algiers, Alejandro Sassoli and Eugenio Ottolenghi, individually and as partners, composing the firm of David Costaguta & Company, and on all of the property, assets and effects of the American-European Trading Corporation, into which the co-partnership assets have been converted, or with which the said assets have been commingled," etc. (Rec., fols. 78, 79).

FOURTH.—That a receiver *pendente lite* be appointed herein of all of the property, assets and effects, of whatever kind, character, nature or description and wheresoever situated, of the co-partnership composed of the plaintiff and the partnership of David Costaguta & Company, and of all of the property, assets and effects of the partnership of David Costaguta & Company \* \* \* which are or have been commingled with the assets of said co-partnership \* \* \*" (Rec., fol. 80).

FIFTH.—"That the plaintiff and each and all of the defendants herein, their agents, servants and employees, and each and every other person, firm or corporation, having possession, custody or control of any of the property of said co-partnership, or property of any of the defendants, be directed to deliver the same to the receiver" and be restrained and enjoined from transferring or making any disposition of such property (Rec., fol. 83).

SIXTH.—"That a temporary restraining order be issued herein, which shall provide that the said

David Costaguta, Marcos Algiers, Alejandro Sassoli, and Eugenio Ottolenghi, individually and as co-partners composing the firm of David Costaguta & Company \* \* \*, the American-European Trading Corporation, its officers, agents, servants and employees, or any other person, firm or corporation having possession, custody and control of any of the property of the co-partnership composed of the plaintiff and the said David Costaguta & Company, or having possession, custody and control of the property of the said defendant the American-European Trading Corporation, be and they hereby are jointly and severally enjoined and restrained, pending the hearing and determination upon the return of a rule *nisi*, from in any manner or form whatsoever, interfering with, assigning, transferring or disposing of or of removing from the jurisdiction of this court any property of any kind, character, nature or description whatsoever and wheresoever situate belonging to the defendants or either of them or belonging to the said co-partnership" (Rec., fols. 84 to 86).

At the time of the filing of the bill of complaint the plaintiff-appellant procured an order or rule *nisi* (Rec., page 37) requiring the defendants to show cause why an order should not be made directing (1) that such a receiver *pendente lite* be appointed; and (2) that the plaintiff and the defendants transfer to such receiver the property of the alleged co-partnership held by them, and enjoining them from dealing in any manner with the property otherwise than to deliver the same to such

receiver. The rule *nisi* also contained a temporary restraining order effective pending the hearing of the motion.

No subpoena or other process has been served on the non-resident members of the firm of David Costaguta & Company but the subpoena and order for rule *nisi* were served on the resident defendants, the American-European Trading Corporation and Renado Taffell. (Rec., pages 34, 35). Thereafter, on March 16th, the plaintiff procured an order for service upon the non-resident defendants by publication, in the method prescribed by Section 57 of the Judicial Code (Rec., pages 112 to 114).

Thereafter, on March 23, 1920, Walter H. Merritt, as attorney for the non-resident defendants, David Costaguta, Marcos A. Algiers, Alejandro Sassoli and Eugenio Ottolenghi, individually and as co-partners in business composing the co-partnership of David Costaguta & Company, filed a special appearance solely for the purpose of applying to the Court for an order vacating, quashing and setting aside the said order for the service by publication of the subpoena upon the said defendants (Rec., pages 118-120), and procure an order (Rec., pages 124-128) from Honorable Learned Hand, D. J., requiring the plaintiff to show cause why an order should not be made vacating, quashing and setting aside the said order as made and for the service by publication on the non-residents, and also vacating, quashing and setting aside certain alleged services of the subpoena upon the alleged agent of the firm of David Costaguta & Company within the Southern District of New York.

The hearing on this order to show cause came on before the Honorable Learned Hand, D. J., simultaneously with the hearing of the rule *nisi* obtained by the plaintiff.

Esselstyn & Haughwout on March 19, 1920, filed a special appearance in behalf of the defendants American-European Trading Corporation and Renado Taffell for the purpose of objecting to the jurisdiction of the United States District Court and for the purpose of opposing the plaintiff's motion on the return of the rule *nisi*. (Rec., pages 116, 117).

After hearing the motions, Honorable Learned Hand, D. J., denied the plaintiff's motion for an injunction and receivership and granted the non-resident defendants' motion to vacate the said order for substituted service. As stated in the opinion of the court (Rec., page 229, fols. 686, 687) the quashing of the order for substituted service necessarily resulted in the dismissal of the plaintiff's bill and final decrees were thereupon signed and entered embodying these decisions and dismissing the bill of complaint. The plaintiff thereupon prepared his papers for this appeal direct to this court under Section 238 of the Judicial Code, claiming a right to have reviewed the decision of the court below on the question of jurisdiction.

The questions presented by the defendants-appellees are as follows:

(a) The case is not one in which the jurisdiction of the District Court is in issue within the meaning of Section 238 of the Judicial Code and therefore the appeal should be dismissed.

(b) The contract which is the basis of the bill of complaint negatives the right of the plaintiff-ap-

pellant to the assertion of any lien upon or interest in any property within the jurisdiction of the Southern District of New York.

### POINT I.

**The case is not one in which the jurisdiction of the District Court is in issue within the meaning of Section 238 of the Judicial Code and therefore the appeal should be dismissed.**

The first question to be determined is the jurisdiction of this court to hear the appeal. In the case of *Fore River Shipbuilding Co. vs. Hagg*, 219 U. S., 175, at page 177, Mr. Justice Day said :

"This court takes notice of its own jurisdiction, and whether the question is raised by the counsel or not, inquires of its own motion whether there is jurisdiction to entertain any given case before it. *Mansfield, Coldwater & Lake Michigan Ry. vs. Swan*, 111 U. S., 379-382."

To the same effect see also :

*Swift & Co. vs. Hoover*, 242 U. S., 107;  
*Empire State-Idaho Mining Co. vs. Hanley*, 205 U. S., 225.

The statute (§238 of Judicial Code) means to give a review, not of the jurisdiction of the court upon general grounds of law or procedure, but of the jurisdiction of the court as a federal court.



Fore River Shipbuilding Co. vs. Hagg, 219 U. S., 175;  
 Louisville Trust Co. vs. Knott, 191 U. S., 225;  
 Bache vs. Hunt, 193 U. S., 523;  
 Blythe vs. Hinckley, 173 U. S., 501;  
 Ill. Central R. R. Co. vs. Adams, 180 U. S., 28, 35;  
 Scully vs. Bird, 209 U. S., 481.

Whether upon the showing in the bill, the plaintiff-appellant is entitled to the relief sought, is not a jurisdictional question in the sense of Section 238 of Judicial Code.

Smith vs. McKay, 161 U. S., 355;  
 Louisville & N. R. Co. vs. Western Union Tel. Co., 234 U. S., 369, 372;  
 Public Service vs. Corboy, 250 U. S., 153, at 162;  
 Illinois Cent. R. R. Co. vs. Adams, 180 U. S., 28, 35;  
 Darnell vs. Ill. Cent. R. R. Co., 225 U. S., 243.

In the case of Public Service vs. Corboy, *supra*, at page 162, the court said:

"The arguments at bar pressed upon our attention considerations based upon the assumed application of general principles of comity, but as on this direct appeal we have power alone to consider questions of the jurisdiction of the court below as a federal court, they are not open to our consideration (Louisville Trust Co. vs. Knott, 191 U. S., 225). This, moreover, puts out of view the argument advanced concerning the adequacy of the aver-

ments of the bill to justify relief, since that subject necessarily, for the reasons stated, must be left to the consideration of the court below when it exercises jurisdiction of the cause."

In the present case, the plaintiff claiming to be a partner with the non-resident partnership of David Costaguta & Company, in addition to his prayer for an accounting upon the termination of the alleged co-partnership, prays that he may be decreed to have a lien on certain assets within this jurisdiction and asks that a receiver be appointed to administer them (Rec., fols. 78 to 82). There is no controversy that certain assets mentioned in the bill of complaint are within the territorial jurisdiction of the United States District Court for the Southern District of New York. This distinguishes the present case from *Chase vs. Wetzlar*, 225 U. S., 79. While there might be some question as to whether an action brought to establish and enforce a so-called partner's lien is the kind of action contemplated by Section 57 of the Judicial Code, under which the plaintiff purported to proceed, this is not the objection raised to the bill of complaint nor the basis of the court's decision. The point made by the defendants before the District Court was that although the bill of complaint may have specifically demanded the relief comprehended in Section 57 of the Judicial Code, the allegations of fact in the bill of complaint clearly negated the complainant's right thereto. This is true because the contract (Rec., pages 82 to 86) which forms the basis of the complaint shows upon its face that the plaintiff was not a partner with the firm of David Costa-

guta & Co. and that, even assuming that it could be so construed, it relegated the plaintiff to rights *in personam*, as he gave up any right to receive a share in the assets as such of the co-partnership, agreeing to accept any amount due him in certain fixed instalments.

That this was the basis of the court's action in the vacating of the order for substituted service and dismissing the bill of complaint clearly appears from a reading of the opinion of the court (Rec., fols. 681-687, pages 227-230) :

(Fol. 683.) "If the liquidation included turning over to the plaintiff his share of the assets when converted into cash, I should agree that his lien, as it is generally called, entitled him to protection of those assets in the hands of the liquidator, and that he could by a suit under Section Fifty-seven of the Judicial Code, follow the assets and insist upon their sequestration by a court, not of course for delivery to him, but at least to await the statement of the accounts and distribution in accordance therewith \* \* \*" (fol. 686). "In no event could the plaintiff ever receive any share in the assets as such, for in either case he is confined to his rights *in personam* against the firm upon their undertaking to pay in instalments his share as eventually settled by liquidation. The only excuse for allowing him to proceed *in rem* would be his right to insist at some time upon the application of this particular property to that payment at some future time, a right which at no time can he possess. I am of course aware that this dis-

position would end the case in this jurisdiction, but that is precisely the result which I think should follow. There seems to me to be no excuse for compelling these defendants to litigate here what should be settled in Argentina, or from impeding them in the settlement, which is progressing, so far as I can see, quite in accordance with their agreement."

The objection was taken precisely in the same manner as in the case of *Gage vs. Riverside Trust Co.* (Circuit Court, So. Dist. of California), 156 Fed., 1002, and in the case of *Jones vs. Gould* (Circuit Court of Appeals, Sixth Circuit), 149 Fed., 153. In the first case, Judge Wellborn said, page 1003:

"Certainly substituted service would not be wise in a case where the bill, although specifically demanding the relief mentioned in the statute, clearly negatived complainant's right thereto; and it seems to me, after careful consideration of the statute, its phraseology and manifest purpose, that such service ought not to be had in any case unless the complainant affirmatively shows his right to the relief, which alone justifies the service."

Of course, if the plaintiff had set forth in his complaint allegations of fact which supported a right to the lien or claim which he attempts to assert by the bill, he might enforce it against the property in the manner and to the extent laid down by the controlling statutes in the jurisdiction wherein the property was situated, but in the

present case, the allegations of fact in the bill negated the existence of any such lien.

It thus appears that the controlling statutes of the particular jurisdiction in which the plaintiff filed his bill of complaint are immaterial to the court's decision. The principles which the court invoked in dismissing the complaint would result in its dismissal by the tribunals of any sovereign. The argument of Mr. Justice Day in the case of *Fore River Shipbuilding Company vs. Hagg*, 219 U. S., 175, is applicable. In that case the plaintiff, a citizen of Sweden, sued a Massachusetts corporation in the Federal Court in that District to recover damages under a penal statute of the state of Massachusetts. This court said (page 179):

"It was a question to be decided upon the application of the same principles as would apply had this action been brought in a court of any other state or nation. Whether other sovereignties would enforce penal actions of the character alleged to have arisen under the Massachusetts statute was not a question peculiar to the federal jurisdiction of the court. It was general in its nature and to be determined upon principles controlling in other courts as well as those of federal creation."

Apparently the plaintiff-appellant, aware of his error in appealing directly to the Supreme Court, has sought to sustain his appeal under Section 238 by introducing a Constitutional question to the effect that the court deprived him of the property right in his action without due process of law, by considering evidence de hors the bill upon a general question of jurisdiction. One of the principal ob-

jections to this contention, irrespective of its merits, is that the case itself does not in any sense involve a Constitutional question. To quote from *Empire State-Idaho Mining Co. vs. Hanley*, 205 U. S., 225, at page 232:

"It has been repeatedly said that it is only when the Constitution of the United States is directly and necessarily drawn in question that such an appeal can be taken, and *the case must be one* in which the construction or application of the Constitution of the United States is involved as controlling" (*Italics ours*).

The court in the present case stated at the outset of that part of its opinion which dealt with the order for substituted service and the consequent dismissal of the bill that it was deciding the question solely on the allegations of the bill of complaint. We believe it to be apparent upon a careful reading of the opinion, that the court considered nothing that did not appear upon the face of the bill of complaint.

## POINT II.

**The contract, which is the basis of the bill of complaint, negatives the right of the plaintiff-appellant to the assertion of any lien upon or interest in the property within the jurisdiction of the Southern District of New York.**

As previously stated, what the plaintiff-appellant claimed to assert by his bill of complaint was

the so-called partner's lien as defined by the common law. The existence of such a lien involves two conclusions: (A), that the plaintiff was a partner and that the specific property against which the lien is sought to be enforced was partnership property in whole or in part, and (B), that the terms of the partnership agreement dealing with the possession of the partnership property and the liquidation of the business were consistent with and showed the partner to be entitled to the assertion of such a lien. The basis of the plaintiff's claim is the contract which he had with the firm of David Costaguta & Company. This was paraphrased by him in the bill of complaint, but the plaintiff states on page 10 of his brief as follows:

"A correct decision of the questions involved largely turns upon that contract.

We conceive that the plaintiff is bound by the terms of the contract as set out in the said translation in matters, if any, in which there is a conflict between the written translation and the allegations of the bill as to the substance of the contract in any particular (We know of no such conflict)."

And on page 87 of his brief says:

"We go further and admit that the literal translation of the contract of partnership annexed to the moving affidavit of plaintiff, and the agreed translation, could properly be considered by the court as a part of the case made by the bill on the question of jurisdiction."

In considering the contract we shall, therefore, consider the language of the translation agreed

upon by counsel (Rec., page 82) in place of the language in which it is expressed in the bill of complaint, it being admitted that the contract itself is, or, at least, is to be treated as part of the bill of complaint.

#### A.

The question as to whether or not there ever was a partnership relation, as claimed, must depend upon the intent of the parties as expressed in the agreement which they made. As stated by Mr. Justice Harlan in *Paul vs. Cullum*, 132 U. S., 539, at page 551:

"Persons cannot be made to assume the relation of partners, as between themselves, when their purpose is that no partnership shall exist. There is no reason why they may not enter into an agreement whereby one of them shall participate in the profits arising from the management of a particular property without his becoming a partner with the others, or without his acquiring an interest in the property itself, so as to effect a change of title."

As is often the case in a contract such as is involved here, the opening paragraph reveals the intent of the parties as to the nature of their relationship. This paragraph is as follows:

"Messrs. David Costaguta & Co. establish in their own House a special section which will be called 'Hosiery Section,' for the purchase and sale of hosiery in general and other articles of knit goods or any other line of



goods, which by common accord it is agreed to exploit, authorizing Mr. De Rees to manage the section."

In other words, David Costaguta & Co. agreed to open "in their own house" a "special section" or department, "authorizing Mr. De Rees (plaintiff-appellant) to manage the section." It is to be noted that the section is established by David Costaguta & Company in their own house, not by David Costaguta & Company in conjunction with the plaintiff. The arrangement thus contemplated was the usual case of a large department store opening up a new department and entering into a contract with some one to manage the same. No words in this paragraph can be construed as implying that the plaintiff was to be other than an employee of the firm. This understanding is confirmed by the sections which follow. Paragraphs 2 and 3 show that the plaintiff was merely to make the necessary purchases within certain limits and to sell the same upon such terms and conditions as should be fixed by the firm of David Costaguta & Company.

Paragraph 4 shows that all overhead expenses were to be borne by the firm, a provision only consistent with the firm's sole ownership of the business. From this and the following paragraphs it is to be noted that the employees paid by David Costaguta & Company were to keep the accounts, a balance being struck each year, to determine profit or loss. The remuneration of Mr. De Rees is fixed as 45% of the net profits, but, as provided in paragraph 7, 50% of this amount was to remain with David Costaguta & Company on deposit

for his account. As shown by paragraph 8, the purpose of this latter provision was to furnish security against a breach of his agreement, David Costaguta & Company being entitled to retain the profits of any fiscal year in which a violation on the part of the plaintiff may have occurred.

### B.

Assuming for the purpose of argument that the contract creates a co-partnership, the case is not one in which the general law is controlling as to the method of liquidation and the rights of the respective parties on dissolution. The contract deals very particularly with these matters, as it is quite natural that it should in view of the fact that the "Hosiery Section" created by the contract was only one section or department in the "House" of David Costaguta & Company. It is not to be supposed that their general business was to be affected by the termination of the contract. In and by paragraphs 11 and 12 of the contract (Rec., pages 84, 85), which define the manner in which the contract may be terminated and how the interests of the respective parties shall be ascertained, the plaintiff surrenders any claim to receive any portion of the assets of the partnership as such or of the proceeds of such assets, agreeing that whatever is found to be eventually due to him upon liquidation, shall be paid to him in instalments falling due at certain stated times. On this point Judge Hand said as follows (Rec., pages 224, 225):

"My reason for thinking that they (David Costaguta & Co.) did have immediate posses-

sion is that both Articles Eleven and Twelve show that they were eventually in any case to get the whole 'business,' and that in so far as the business involved anything but 'merchandise' in the nature of things, they became owners at once. This is because they were not to divide the surplus with De Rees in specie, but under both articles it was to be treated as theirs, and they became indebted to him for his final share, payable in installments with interest. That effectively precludes any division. Now as they were not to divide the proceeds it would be an unexpected purpose which should contemplate his having joint possession of merchandise pending its sale, whose proceeds he was not to share. Moreover, under Article Twelve, David Costaguta & Company were to have ownership and possession at once; yet the only difference between the two articles is that under Article Twelve the merchandise was to be taken at its book value, while under Article Eleven it was to be sold. I do not readily perceive why that single difference should have given De Rees an intermediate joint possession until the value was ascertained in this alternative way. The argument drawn from the phrase, 'common accord,' is not valid; it refers only to the striking of an account between the parties."

**POINT III.**

**Lastly, the appeal should be dismissed and the decrees affirmed.**

**WALTER H. MERRITT,**

Solicitor for non-resident defendants David Costaguta, Marcos A. Algiers, Alejandro Sassoli, Eugenio Ottolenghi, individually and as co-partners in the business of David Costaguta & Company, appearing specially herein.

**A. DELAFIELD SMITH,**

Solicitor for resident defendants, Renado Taffell, and the American-European Trading Corporation, appearing specially herein.

**DE REES v. COSTAGUTA ET AL., INDIVIDUALLY  
AND AS CO-PARTNERS COMPOSING THE CO-  
PARTNERSHIP OF DAVID COSTAGUTA AND  
COMPANY, ET AL.**

**APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES  
FOR THE SOUTHERN DISTRICT OF NEW YORK.**

No. 341. Submitted October 11, 1920.—Decided December 6, 1920.

A jurisdictional appeal, directly to this court from the District Court under § 238 of the Judicial Code, will not lie where the question of jurisdiction presented and decided involved only principles common to courts in general and not the jurisdiction of the District Court as a federal court. P. 173.

Whether the allegations of a bill are adequate to justify the relief sought, is not a question of jurisdiction. *Id.*

Where the jurisdiction of the District Court is invoked against non-resident defendants under Jud. Code, § 57, to enforce a lien on property within the district claimed to result from a contract between them and the plaintiff, a decision quashing service by publication, followed by a judgment dismissing the bill, upon the ground that

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## Argument for Appellant.

the contract alleged creates no lien upon or right *in rem* in such property, does not involve the jurisdiction of the court as a federal court. *Id.* *Chase v. Wetlar*, 225 U. S. 79, distinguished.

Questions arising under the Constitution are not presented in this case. P. 174.

Appeal dismissed.

THE case is stated in the opinion.

*Mr. Marion Erwin* and *Mr. Frederick M. Czaki* for appellant:

The District Court had general jurisdiction of the parties.

All the requisite elements existed to give the court jurisdiction of the subject-matter under § 57, Jud. Code. *Goodman v. Niblack*, 102 U. S. 556; *Louisville & Nashville R. R. Co. v. Western Union Telegraph Co.*, 234 U. S. 369; *Chesley v. Morton*, 9 App. Div. 461. Distinguishing: *York County Savings Bank v. Abbot*, 139 Fed. Rep. 988; *Jones v. Gould*, 149 Fed. Rep. 153; *Wabash R. R. Co. v. West Side Belt R. R. Co.*, 235 Fed. Rep. 645.

The constitutional principle invoked against the exercise by the court of the power to dismiss the bill, in part on *ex parte* affidavits in opposition to the jurisdictional averments of the bill, in the manner and form in which it was done, raised and raises a constitutional question not merely incidentally collateral to the general jurisdiction of the court derived from the Constitution, but which goes to the power of the court to deprive the plaintiff without due process of law of his right of property in the suit, by a procedure which deprived him of such right. The constitutional question goes to the marrow of the jurisdictional question, and we think that the court has plenary jurisdiction over the whole case under § 238, Jud. Code. We know of no decision of this court which covers this matter, unless it be by inference, *Filhiol v. Torney*, 194 U. S. 356.

A constitutional question may become "involved" or "drawn in question" by the decision or action of the court as well as by the acts of the parties (*Chappell v. United States*, 160 U. S. 499, 507, 509), and if it exists it is immaterial whether there is or not a certificate as to the jurisdiction, so far as investing this court with plenary power to review the entire case. The constitutional question being paramount, the limitation on review is not operative, certainly not where the one involves the other. The limitation is operative only where there is a jurisdictional question and questions other than constitutional ones involved.

Section 37 of the Code gave the court no power under the circumstances to dismiss for want of jurisdiction without any plea to the jurisdiction on which evidence might be taken and witnesses examined pro and con. *Hartog v. Memory*, 116 U. S. 588; *Turpin v. Lemon*, 187 U. S. 51, 58; *Hurtado v. California*, 110 U. S. 516, 539. And here the court in fact reached its conclusion, not on the face of the bill merely, but in part through facts set up in the opposing *ex parte* affidavits as interpretative of the contract. But in the manner in which it proceeded it deprived plaintiff of due process of law and his constitutional right to invoke the jurisdiction of the court for protection of his property right, and thus it was without jurisdiction to dismiss the bill upon the *ex parte* evidence it so received and considered.

*Mr. Walter H. Merritt* for appellees. *Mr. A. Delafield Smith* was also on the brief.

They cited, on the jurisdictional question: *Fore River Shipbuilding Co. v. Hagg*, 219 U. S. 175, 177; *Swift & Co. v. Hoover*, 242 U. S. 107; *Empire State-Idaho Mining Co. v. Hanley*, 205 U. S. 225, 232; *Louisville Trust Co. v. Knott*, 191 U. S. 225; *Bache v. Hunt*, 193 U. S. 523; *Blythe v. Hinckley*, 173 U. S. 501; *Illinois Central R. R. Co. v.*

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Opinion of the Court.

*Adams*, 180 U. S. 28, 35; *Scully v. Bird*, 209 U. S. 481; *Smith v. McKay*, 161 U. S. 355; *Louisville & Nashville R. R. Co. v. Western Union Telegraph Co.*, 234 U. S. 369, 372; *Public Service Co. v. Corboy*, 250 U. S. 153, 162; *Darnell v. Illinois Central R. R. Co.*, 225 U. S. 243; *Chase v. Wetzlar*, 225 U. S. 79; *Gage v. Riverside Trust Co.*, 156 Fed. Rep. 1002; *Jones v. Gould*, 149 Fed. Rep. 153.

MR. JUSTICE DAY delivered the opinion of the court.

The appellant, plaintiff below, a resident and citizen of the State of New Jersey, filed a bill of complaint against David Costaguta, Marcos A. Algiers, Alejandro Sassoeli, Eugenio Ottolenghi, individually, and as co-partners composing the firm of David Costaguta & Company, asserting that they, and each of them, were aliens, and residents of the Republic of Argentine, South America. The bill joined as defendants Renado Taffell, a British subject, resident of New York and the Southern District thereof, and the American-European Trading Corporation, organized under the laws of New York.

The bill sets forth at length a contract whereby it is alleged that a co-partnership was formed between the plaintiff and David Costaguta & Company for the buying and selling of hosiery. The bill alleges that to carry the contract into effect a place of business was established in New York City; that disagreements arose between the parties; that plaintiff elected to terminate the contract and demanded a liquidation of the merchandise and an accounting; that the firm of David Costaguta & Company caused the American-European Corporation to be organized under the laws of New York and that said firm caused certain assets of the co-partnership to be transferred to the corporation in fraud of the plaintiff, and which assets, it was alleged, were within the territorial jurisdiction of



the Southern District of New York. Plaintiff prayed a dissolution of the alleged co-partnership; the liquidation of the property thereof; that the non-resident defendants account for their acts and transactions, and that it be established what sum, if any, remained due to the plaintiff; that the plaintiff be decreed to have a lien upon all of the property of the defendants and on the property and assets of the American-European Trading Corporation; that a receiver *pendente lite* be named. An order was prayed for the delivery of the property to the receiver, and an injunction to restrain its transfer or disposition. A temporary restraining order was asked, pending the hearing and the return of the rule *nisi*, prohibiting in any manner or form interference with the property, or removing the same from the jurisdiction of the court. An order was issued requiring the defendants to show cause why such receiver *pendente lite* should not be appointed, and the defendants required to transfer the property to such receiver, and enjoining them from otherwise transferring the same. The subpoena and order for the rule were served on the resident defendants American-European Trading Corporation and Taffell. Plaintiff then procured an order for service upon the non-resident defendants by publication under § 57 of the Judicial Code. The non-resident defendants filed a special appearance for the purpose of asking the court to quash and set aside the order for service by publication, and for an order requiring the plaintiff to show cause why an order should not be made vacating and setting aside the service by publication, and also to vacate, quash and set aside certain alleged service on an agent of the firm in the Southern District of New York. A motion was also made by the American-European Trading Corporation and Taffell, by special appearance, for the purpose of opposing the jurisdiction. The District Court denied the plaintiff's motion for an injunction and receiver, and granted the non-resident

defendants' motion to vacate the order for service by publication. This resulted in the dismissal of the plaintiff's bill by final decree, and the case was brought here by the plaintiff under § 238 of the Judicial Code upon the question of jurisdiction of the court.

The District Judge after entering the decrees of dismissal made a certificate as follows:

"I hereby certify that said decrees were entered solely because the case as made by the bill did not set forth a legal or equitable claim to or lien on the property in the district, of which this court would have jurisdiction within the meaning of Section 57 of the Judicial Code, or in which this court could render a judgment otherwise than a judgment *in personam* against the non-resident aliens who appeared specially and objected to the jurisdiction of the court."

The Judge also delivered an opinion, which is in the record, holding that under the terms of the contract the plaintiff had no right in the assets as such, and no partner's lien upon the property, but was confined to his rights *in personam* against the firm, and that, therefore, there could be no service by publication under § 57 of the Judicial Code. That section is a reenactment of § 3 of the Act of March 3, 1875, c. 137, 18 Stat. 472. It provides for service by publication when in any suit commenced in any district court of the United States to enforce any legal or equitable lien upon, or claim to, or to remove any incumbrance or lien or cloud upon the title to real or personal property within the district where such suit is brought, one or more of the defendants therein shall not be an inhabitant of or found within the said district, or shall not voluntarily appear thereto.<sup>1</sup>

Section 238 of the Judicial Code provides that, the case

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<sup>1</sup> Section 57. "When in any suit commenced in any district court of the United States to enforce any legal or equitable lien upon or claim to, or to remove any incumbrance or lien or cloud upon the title to real

being one in which the jurisdiction of the court is in issue, that question shall be certified to this court.

The appellees challenge the jurisdiction of this court to entertain this appeal on the ground that the case does not present a jurisdictional issue properly reviewable by this court.

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or personal property within the district where such suit is brought, one or more of the defendants therein shall not be an inhabitant of or found within the said district, or shall not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant or defendants to appear, plead, answer, or demur by a day certain to be designated, which order shall be served on such absent defendant or defendants, if practicable, wherever found, and also upon the person or persons in possession or charge of said property, if any there be; or where such personal service upon such absent defendant or defendants is not practicable, such order shall be published in such manner as the court may direct, not less than once a week for six consecutive weeks. In case such absent defendant shall not appear, plead, answer, or demur within the time so limited, or within some further time, to be allowed by the court, in its discretion, and upon proof of the service or publication of said order and of the performance of the directions contained in the same, it shall be lawful for the court to entertain jurisdiction, and proceed to the hearing and adjudication of such suit in the same manner as if such absent defendant had been served with process within the said district; but said adjudication shall, as regards said absent defendant or defendants without appearance, affect only the property which shall have been the subject of the suit and under the jurisdiction of the court therein, within such district; and when a part of the said real or personal property against which such proceedings shall be taken shall be within another district, but within the same State, such suit may be brought in either district in said State: *Provided, however*, That any defendant or defendants not actually personally notified as above provided may, at any time within one year after final judgment in any suit mentioned in this section, enter his appearance in said suit in said district court, and thereupon the said court shall make an order setting aside the judgment therein and permitting said defendant or defendants to plead therein on payment by him or them of such costs as the court shall deem just; and thereupon said suit shall be proceeded with to final judgment according to law."

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## Opinion of the Court.

Since the decision of *Shepard v. Adams*, 168 U. S. 618, it has been the accepted doctrine that where there is a contention that no valid service of process has been made upon the defendant, and the judgment is rendered without jurisdiction over the person, such judgment can be reviewed by direct appeal to this court. This principle was restated and previous cases cited as late as *Merriam & Co. v. Saalfeld*, 241 U. S. 22, 26.

It is equally well settled that, where the question of jurisdiction presented and decided turns upon questions of general law, determinable upon principles alike applicable to actions brought in other jurisdictions, the jurisdiction of the court as a federal court is not presented in suchwise as to authorize the jurisdictional appeal directly to this court; and the question must be decided as other questions are, by the usual course of appellate procedure, giving review in the Circuit Court of Appeals. *Louisville Trust Co. v. Knott*, 191 U. S. 225; *Bache v. Hunt*, 193 U. S. 523; *Fore River Shipbuilding Co. v. Hagg*, 219 U. S. 175; *Scully v. Bird*, 209 U. S. 481, 485; *Bogart v. Southern Pacific Co.*, 228 U. S. 137.

That the question of the adequacy of the allegations of the bill to justify the relief sought does not present a jurisdictional question was held in *Smith v. McKay*, 161 U. S. 355; *Illinois Central R. R. Co. v. Adams*, 180 U. S. 28; *Louisville & Nashville R. R. Co. v. Western Union Telegraph Co.*, 234 U. S. 369, 372; *Darnell v. Illinois Central R. R. Co.*, 225 U. S. 243; *Public Service Co. v. Corboy*, 250 U. S. 153, 162.

The opinion of the court below, read in connection with the certificate, shows that it was held that the contract set up in the bill gave no lien upon or right *in rem* in the assets sought to be reached within the district. The question was presented, the court in the exercise of jurisdiction, after an examination of the contract set forth in the bill and a consideration of its terms, determined it

upon principles which would have been equally applicable had the question been presented in other jurisdictions. Its decision, therefore, did not involve the jurisdiction of the federal court as such, which, it is settled, is required in order to justify a direct appeal to this court.

In *Chase v. Wetzel*, 225 U. S. 79, the Act of March 3, 1875, now § 57 of the Judicial Code, was involved, and there was an attempt to have service on alien defendants by publication under the provisions of the statute. The issue made was as to whether there was property of the defendants within the jurisdiction of the court. That issue was held to present a question of jurisdiction properly reviewable in this court under § 238. In the case now presented no question is made as to the presence of property in the district. The attempted service was set aside, and the bill dismissed, upon consideration of the allegations of the bill which, it was held, upon application of general principles, did not show that the plaintiff had any lien upon or interest in the property authorizing him to invoke the procedure outlined in § 57 of the Judicial Code.

As to the contention that the whole case is here upon a constitutional question because of the procedure in the court below, § 238 provides that when a case comes here upon a question of jurisdiction, that question alone shall be certified. Moreover, we find no merit in the alleged deprivation of constitutional rights so as to present questions arising under the Constitution.

It follows that the appeal must be dismissed for want of jurisdiction.

*Dismissed.*